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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted]32

GALE H. JOHNSON,

Petitioner,

vs.

JOHN E. BENNETT, WARDEN, IOWA STATE PENITENTIARY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RONALD L. CARLSON,
College of Law,
University of Iowa,
Iowa City, Iowa,
Counsel for Petitioner.

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JOHN E. BENNETT, WARDEN, IOWA STATE PENITENTIARY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on November 28, 1967.

CITATION TO OPINIONS BELOW.

The orders of the United States District Court are unreported and are printed in Appendix A hereto. The opinion of the United States Court of Appeals is printed in Appendix B hereto.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 28, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

Is a conviction in a criminal case constitutionally obtained when a law enforcement officer jails a trial witness subpoenaed by the accused, retaining the witness in custody for the duration of the trial, meanwhile reporting to court and counsel that the witness is confined as a patient in a mental institution?

May a state constitutionally shift the burden of proof to the accused in a criminal case by requiring the defendant to prove his absence from the scene of a crime as a condition for acquittal?

Is the conviction of an accused person vitiated by a prosecutor's employment of false evidence to obtain the conviction, absent a demonstration of complicity on the part of the prosecutor himself in the preparation of such false evidence?

CONSTITUTIONAL PROVISION.

The constitutional provision involved is Amendment 14, Sec. 1, Constitution of the United States: "No state shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT.

Petitioner herein was charged with murder of a police officer in Burlington, Iowa, which fatality occurred on the morning of May 27, 1934, between 5:30 and 6:00 a.m. He pled not guilty to the indictment. There were no eyewitnesses to the fatality itself, and upon trial of the case petitioner presented eight witnesses who testified they saw

him in Des Moines, Iowa, some 164 miles away, during the time the alleged offense took place. These witnesses included the owner of a gas station who filled the tank of petitioner's car in Des Moines at about the time of the fatality, and the owner of a business establishment who saw the defendant in his place of business on the same morning.

Two key points of evidence were instrumental in the prosecution's case. First, two felons at the prison where the accused was being held pending trial testified they overheard the petitioner tell another prisoner named Yates that he, the petitioner, had committed the offense. The claimed conversation with Yates supposedly occurred in the prison "yard." This testimony was emphatically denied by Yates at the trial, who testified he never had such a conversation with the petitioner. Prison officials further testified on behalf of the defense that the petitioner was in the company of a guard at all times when out of his cell, and the guard was under strict orders to permit no conversation with the petitioner. However, the testimony of the two prisoners was supported by inculpatory notes allegedly prepared by the petitioner for secret passage to persons outside the penitentiary. These notes supposedly found their way into the hands of the two felons who overheard the reported statements to Yates, and the notes were produced at trial by the prosecution. Evidence recently presented in petitioner's habeas corpus hearing in Federal District Court demonstrates that these notes were fraudulent, were not prepared by the petitioner, and were false evidence. The respondent concedes that the introduction of such evidence at petitioner's trial was error, but claims that it was not prejudicial.

The second area of critical testimony at petitioner's original trial emanated from two witnesses who did not observe the fatality but who identified the defendant as near

the scene shortly thereafter. In an attempt to discredit their testimony, and to support the witnesses who placed the defendant in Des Moines at the time of the alleged offense, petitioner attempted to subpoena one Thomas Orsucci. Orsucci was originally identified by one of the Burlington witnesses as implicated in the homicide. The record does not clearly indicate that this was a positive identification, but it was apparently made with sufficient certitude to result in Orsucci being arrested and charged with first degree murder. The identification proved to be in error. In addition, prior to trial the Burlington authorities announced that Orsucci had been identified as being in a nearby "beer tavern" with petitioner the night before the fatality, a further circumstance rendering the trial testimony of Orsucci extremely relevant. After issuance of the subpoena for Orsucci, it was sent to the Polk County, Iowa, sheriff's office for service on the witness. Shortly thereafter, the trial court and petitioner were informed by the sheriff's office that Orsucci was unavailable in that he was institutionalized in the Clarinda Institution for the Insane. This was incorrect. In fact, Orsucci was confined at that very time in the Sheriff's custody at the Polk County jail. (Fed. D. Ct. Order, April 26, 1966, App. A, *infra*, p. 20; Fed. D. Ct. Order, Dec. 6, 1966, p. 3, n. 1, App. A, *infra*, p. 28; Record, Federal District Court Habeas Corpus Hearing 18-20, hereafter referred to as H. R.)

As heretofore indicated, various witnesses testified that the petitioner was in and about Des Moines on the morning of the homicide. At the close of petitioner's trial, the trial court directed the jury that in order to acquit the defendant on the basis that defendant may have been elsewhere at the time of the crime, defendant was required to prove he was elsewhere. The Circuit Court of Appeals found (1) that this jury charge placed the burden of proof on the accused, and (2) that such a charge is erroneous under the

great weight of authority. (Appendix B, *infra*, pp. 42-43.) However, the court declined to grant habeas relief, noting that the Supreme Court has not yet passed upon the question involved here. The jury charge in issue is printed in Appendix C hereto.

Petitioner's original trial concluded and a verdict was rendered on November 24, 1934. The jury rejected first degree murder, and instead rendered a verdict of guilty of murder in the second degree. On December 10, 1934, petitioner was sentenced to life imprisonment, which sentence he continues to serve. His conviction was affirmed on appeal. *State* v. *Johnson*, 221 Iowa 8, 264 N. W. 596. See also *State* v. *Johnson*, 221 Iowa 8, 21, 267 N. W. 91, correcting certain errors made by the Iowa Supreme Court in its first opinion.

Subsequently, the significant facts disclosed above were discovered, and to make these facts known to the court petitioner attempted to obtain an evidentiary hearing in state habeas corpus. His attempts were unsuccessful. His last effort in this regard resulted in a summary order of the Iowa Supreme Court denying relief. (Order, Iowa Sup. Ct., Jan. 6, 1966.) Petitioner thereafter filed a petition for federal habeas corpus on February 16, 1966. He demonstrated that he had exhausted his state remedies, and alleged that federally protected rights had been violated by certain unconstitutional practices which resulted in his confinement. An evidentiary hearing was held pursuant to *Fay* v. *Noia*, 372 U. S. 391, and *Townsend* v. *Sain*, 372 U. S. 293. At this hearing, a leading expert on handwriting analysis demonstrated that the notes produced by the state at petitioner's original trial were not written by the petitioner, contrary to the trial testimony of the state at that time. (H. R. 104-13, 120-21.) Prior to the habeas corpus hearing, these notes were also submitted to the state's present handwriting expert at the Bureau of Criminal Investigation, and

this expert fully agreed that the petitioner did not author the inculpatory notes. As a result, the respondent conceded that the introduction of the notes at petitioner's original trial was incorrect. (Resp. trial brief, Nov. 10, 1966, p. 11.)

Notwithstanding the cited evidence, the District Court denied habeas corpus relief. (D. Ct. Orders, April 26, 1966; Dec. 6, 1966.) In so doing, however, the District Court expressed major concern over the Iowa trial court's procedure in shifting the burden of proof to the accused, referring to the alibi instruction which did so as confusing and inconsistent. (Fed. D. Ct. Order, April 26, 1966, Appendix A, *infra,* pp. 23-4.) Subsequently, the District Court ordered the issuance of a certificate of probable cause under 28 U. S. C. 2253, directing specific attention to the jury charge which placed the burden of proof on the accused. (D. Ct. Order, Jan. 4, 1967.)

In considering this issue, the Court of Appeals pointed out that *Glover* v. *United States,* 147 F. 426, struck down as constitutionally impermissible an instruction similar to that employed in the instant case. The court added that a jury charge which shifts the prosecution's burden to the defendant is improper under the vast majority rule:

> The Supreme Court has not passed upon the validity of this type of instruction but the great weight of authority supports the view that such an instruction is erroneous. See *Thomas* v. *United States,* 9 Cir. 213 F. 2d 30; Comment, 49 Iowa L. Rev. 590. (Appendix B, *infra,* p. 43.)

While indicating serious question respecting the Iowa procedure involved here, the court appears to have been hesitant to grant habeas relief because of concern over another issue, retroactivity:

> We are not squarely confronted with retroactivity here as there has been no authoritative decisions by

> the Supreme Court determining the challenged instruction violated federally guaranteed constitutional rights. However, the reasoning of the Supreme Court cases dealing with retroactivity lends support to the determination that the conviction should not be set aside by reason of the alibi instruction. The cases hold that retroactive application of newly announced constitutional determinations to state prosecutions shall be determined on a case-to-case basis. (Appendix B, *infra*, p. 44.)

The court went on to affirm the judgment of the District Court.

Respecting the problems of the suppressed witness and the fabricated notes involved here, the court below stressed the fact that there was no clear demonstration that the prosecutor personally participated in the wrongdoing. After finding that the evidence indicated that witness Orcussi was concealed by the state, the Court of Appeals separated the actions of the sheriff and those of the prosecutor: "Such evidence establishes a prima facie case that the return of the Polk County sheriff is false. . . . The record indicates that the prosecuting attorney had no knowledge of the falsity of the return, and the defendant as a witness states that he has no evidence to the contrary." (Appendix B, *infra*, p. 40.)

The need for direct proof of prosecutorial complicity was deemed a controlling factor in connection with the false notes: "So far as we have been able to ascertain, all the Supreme Court cases setting aside convictions for want of due process by reason of the reception of false testimony are based upon the knowledge of the prosecutor that the testimony received is false or knowledge that material evidence has been suppressed." (Appendix B, *infra*, pp. 37-8.)

REASONS FOR GRANTING THE WRIT.

1. The ruling of the court below denying petitioner relief because he could not present direct evidence of the prosecutor's knowledge of false evidence or suppression of testimony is in conflict with the due process mandate established by this Court. The court below stated that all the Supreme Court cases setting aside convictions for want of due process are based upon knowledge of the prosecutor that the testimony received is false or knowledge that material evidence has been suppressed. (Appendix B, *infra*, pp. 37-8.) This proposition is in conflict with the decisions of this Court in *Brady* v. *Maryland*, 373 U. S. 83, and *Pyle* v. *Kansas*, 317 U. S. 213, as well as the Court of Appeals decisions in *Barbee* v. *Warden, Maryland Penitentiary*, 331 F. 2d 842, *Curran* v. *Delaware*, 259 F. 2d 707, and *Jones* v. *Commonwealth of Kentucky*, 97 F. 2d 335. Specifically, these cases indicate that suppression of evidence by the government vitiates the conviction of an accused person, whether that suppression is accomplished by the prosecutor or any other arm of the state.

Deception resulted in the instant case from the subpoena return made by the sheriff indicating that an important trial witness was confined in a mental institution. The witness sought by the defense was at that very time in the custody of the sheriff making the indicated return, a fact then unknown to the petitioner. The record is void of any evidence that transfer of the witness to a mental hospital was ever contemplated or took place.

This witness had been specifically requested by petitioner under an Iowa statute which authorizes the issuance of a subpoena for a defense witness at state expense if the

trial court finds that the desired witness to be "material and necessary" for the defense. Section 781.2, Iowa Code (1966), formerly Section 13880, Iowa Code (1931). The trial court ordered that the subpoena issue, foreclosing speculation that the requested witness was not material or necessary. This latter point was untreated by the Court of Appeals, although specifically raised in both the original and reply briefs of the petitioner in the court below.

Brady v. *Maryland* held that suppression by the prosecution of material evidence favorable to an accused violates due process. *Barbee* v. *Warden, Maryland Penitentiary* makes clear that the duty to desist from suppression and to disclose such evidence extends to all officers in the state's official process. See Comment, 42 N. Y. U. L. Rev. 764, 766 (1967). *Barbee* further indicates that in the cases wherein such an officer actively suppresses requested evidence the sentence will be set aside, even without a showing of prejudice by the defendant.

The decision of the court below conflicts with these important precedents. The question of whether a conviction may be maintained when a key trial witness for the defense has been suppressed under the circumstances disclosed here is an important one. This is especially so where the subpoena for that witness is authorized only after the defense demonstrates to the trial court, which is in the best position to make such a judgment, that the witness is material and necessary. No discovered suppression of evidence case appears to involve the concealment of a witness specifically known to the accused and requested by him, and the subject cause thus appears to pose an original question of high import. Settlement of this significant problem appears plainly in the interest of the administration of criminal justice.

2. The court below decided that petitioner's conviction

was not vitiated by the reception of false evidence and testimony respecting inculpatory notes allegedly written by the petitioner. Although these notes have now been repudiated by both the state and the defense, the court stated that there was no substantial evidence to show that the trial prosecutor knew of the falsity of the evidence. (Appendix B, *infra*, p. 38.) Thus, the court determined, there was no basis to set aside the conviction. In so ruling, the decision appears clearly erroneous and in conflict with *Brady* v. *Maryland*, 373 U. S. 83, and *Jones* v. *Commonwealth of Kentucky*, 97 F. 2d 335.

The court below does not seem to question the significant role played by the false evidence in petitioner's trial. Indeed, such a position would be difficult to take in view of the record. The subject of the controverted notes occupied all or part of the testimony of five witnesses presented by the state, and the prosecutor in closing argument pressed home with considerable persistence the "fact" that Gale Johnson authored the notes in question—a "fact" now disclosed to be untrue. (Original trial record, pp. 166-205, 353-54, 355.) Rather, the court below rejected petitioner's claim for the expressed reason that all the cases setting aside convictions by reason of the reception of false testimony are based upon knowledge of the prosecutor that the evidence received is false. It is submitted that this view of the law and the attendant ruling is clearly incorrect in view of this Court's pronouncements in *Brady* v. *Maryland*. That case, as well as *Jones* v. *Commonwealth of Kentucky*, illustrates that the due process mandate in the false evidence cases "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." 373 U. S. at 87. See Note, 74 Yale L. J. 136, 142 (1964). The view of the court below, to the effect that there is no unsettling vice in the employment of tainted evidence absent a showing of prosecutorial complicity,

should be corrected. The fundamental interpretations announced by this Court proscribing the use of false evidence constitute bulwarks for American justice, and their proper application in cases such as this one form crucial protections for all accused persons.

The error of the lower court can be more fully appreciated with some insights into the setting in which the false evidence was employed by the prosecution. At petitioner's original trial, testimony developed that the prosecutor had gone into the prison and offered prisoners a sum of money, to wit $25.00, if they would assist him by discovering and telling him the names of defendant's trial witnesses. (Original trial record, pp. 281, 298-99, 307, 311, 353.) Two of the prisoners went further, however, and produced the incriminating notes allegedly written by the petitioner. These notes, when introduced for jury consideration, presented the petitioner as a person seeking to fabricate an alibi with friends outside the penitentiary, an especially damaging impression to create in a case where the credibility of the petitioner's alibi witnesses would be decisive. The state's erroneous introduction of the false notes, supported at that time by expert testimony which has now been discredited, formed a major link in that chain of prosecution evidence. The situation was further complicated by the fact that the prosecutor held these notes for several months, giving the accused notice of their existence only on the eve of trial. Iowa law requires that the accused be given notice of the state's evidence prior to trial, and in connection with other portions of the state's case the accused received such notice several weeks in advance of the trial. Notice that the false notes would be used was withheld almost until the last legally possible moment, affording petitioner scarce opportunity to give the evidence the detailed type of screening by an expert which would have revealed its falsity.

3. An important question of federal law is raised by the procedure which was employed in petitioner's trial to shift the burden of proof to him. The procedural device which accomplished this result was an instruction directing the jury that the petitioner must prove by a preponderance of the evidence that he was elsewhere at the time of the crime in order to be acquitted under that theory. *Glover* v. *United States,* 147 Fed. 426, strikes down an almost identical instruction on fundamental constitutional grounds, ruling that such a jury charge is antagonistic to basic notions of burden of proof and reasonable doubt in criminal cases.

Indicating the necessity for settlement by this Court, the court below stated that although the Supreme Court had not passed upon the validity of this type of jury charge, the great weight of authority condemned such a charge as erroneous (Appendix B, *infra,* p. 43). Again, the court below stated that there has been no authoritative decision by the Supreme Court that the challenged instruction violates federally guaranteed constitutional rights. It would appear that the court below was inviting direction from this Court on the problem. Certainly this is an important question which has not been, but should be, settled by this Court.

Glover v. *United States* and *Thomas* v. *United States,* 213 F. 2d 30, treated exactly the problem posed by petitioner here. Both cases invalidated burden-shifting jury instructions of the type employed in petitioner's trial. The *Glover* case is especially in point, and it castigates such an instruction with these words:

> The underlying vice in the foregoing charge of the court is in the assumption that in respect of the alibi the burden of proof "by a preponderance of evidence, that is, by the greater and superior evidence," shifted to the defendant. It loses sight of the fundamental

> rule in criminal procedure that the defendant is presumed to be innocent of the offense with which he is charged; that this is a continuing presumption which attends him like a guarding spirit throughout the ordeal of his trial, and imposes upon the prosecution the burden of overcoming such presumption by such weight of evidence as will satisfy the minds of the triers beyond a reasonable doubt of the defendant's guilt. This reasonable doubt in his favor applies to the evidence in its entirety and necessarily to any part of it. 147 Fed. at 431.

The decision in *Glover* is the leading federal authority on the question considered, and its impact on American law has been widespread. See *Thomas* v. *United States,* 213 F. 2d at 33-34 for collected cases. The decision of the court below appears in conflict with the reasoning of these cases. It is true that *Glover* and *Thomas* treated the instant problem in the context of federal trials. But their reasoning does not turn on some special feature of law applicable in federal courts. Rather, they strike down alibi instructions which shift the burden of proof to the accused because such a jury charge violates basic constitutional rights of the accused. Certainly these rights are equally destroyed when a nearly identical instruction is employed in a state trial.

The treatment of burden of proof in the alibi cases has been the subject of considerable controversy in Iowa. The forceful dissenting opinions in *State* v. *La Mar,* 151 N. W. 2d 496, 504 (Iowa 1967) and *State* v. *Stump,* 254 Iowa 1181, 1203, 119 N. W. 2d 210, 223 (1963), underline the disagreement. The Iowa approach is followed in only a few states, and has been severely criticized by the commentators. See Comment, 49 Iowa L. Rev. 590 (1964); Underhill, Criminal Evidence, Sec. 441 (5th ed. 1956). See also 4 Wharton, Criminal Law and Procedure 772 (1957); McCormick, Evidence 683-84 (1954); Chamberlayne, Evidence, Sec. 973 (1911). Wigmore's current listing indicates that five juris-

dictions, including Iowa, shift the burden to the accused on the question of alibi. 9 Wigmore, Evidence, Sec. 2512, n. 3 (1964 Supplement). See also 1 Wharton, Criminal Evidence 68-70 (12th ed. 1955). It does appear that Iowa is in a slim and shrinking minority on this question. As indicated in *Leland* v. *Oregon*, 343 U. S. 790, 798, the fact that a contrary practice is followed in the vast majority of states is not conclusive that the majority practice is the one which accords with due process, but that fact is plainly worth considering.

The practice of shifting the burden of proof to the accused exists in only a few states, but in those states the impact of this procedure on the rule of reasonable doubt is dramatic. Evidence presented by defense witnesses may raise a reasonable doubt of the accused's presence at the scene of a crime. Normally, this would be sufficient to acquit. However, the jury is then told that they may not acquit on such reasonable doubt, but may acquit only if the accused has gone further and has proven by a preponderance of the evidence that he was elsewhere. It becomes apparent why the leading authorities on the law of evidence term such a direction to the jury legally incongruous and well calculated to confuse the understanding of the jurors. This procedure was especially prejudicial in the case at bar, where the credibility of petitioner's alibi witnesses was already undercut by the state's production of false evidence.

In addition to the above problem, a further anomaly presents itself under the Iowa rule:

> If the defendant testifies that he was not present at the scene of the crime, no burden of proof is cast upon him and his testimony raises only the question of credibility. Thus, the jury could acquit the defendant on the basis of alibi alone when the only proof is defendant's testimony. However, if he calls witnesses to corroborate his alibi, the defendant is said to have assumed the offensive and the burden of proof by a pre-

ponderance of the evidence rests upon him. Comment, 49 Iowa L. Rev. at 596.

Two features of the lower court's opinion require comment at this point. First, the Federal District Court cited *Leland* v. *Oregon* as supportive in its order rejecting habeas relief, a citation referred to by the court below. It is to be noted that the concept involved in *Leland*, that of the accused's sanity, is totally dissimilar from the proposition involved here. In separating the concepts of insanity and alibi, Underhill, Criminal Evidence, Sec. 441 (5th ed. 1956) sets forth the following pointed statement which makes clear the unrelated character of the problems:

> Some courts treat alibi, like insanity, as an affirmative defense and cast on the defendant the burden of establishing it, either by a fair preponderance of the evidence or to the reasonable satisfaction of the jury, although never beyond a reasonable doubt. It seems fallacious to call alibi an affirmative defense and place the burden of proving it on defendant. In most criminal cases the state must prove that accused was present at the scene of the crime, and the defendant may negate this in any way that he can, including the introduction of testimony that he was not present because he was elsewhere. Proof of alibi thus appears to negative an essential element of the crime rather than set up affirmative matter. Further, it is difficult to compare alibi with insanity. The reason that some jurisdictions place on defendant the burden of proving insanity is that insanity is a departure from the norm; people are presumed to be sane. There is obviously no presumption that the defendant was present at the scene of the crime.

A second feature of the lower court opinion requiring mention is the apparent confusion over the concept of retroactivity. The court, intimating that the questioned jury charge may be unconstitutional, questioned whether such a rule would inure to the benefit of this petitioner. This

analysis appears to overlook the guiding principles set forth in *Stovall* v. *Denno,* 388 U. S. 293. The *Stovall* decision points out that litigants in cases which make clear a constitutional requirement always obtain to retroactive benefit of the rule, even though such rule may be prospectively applied for subsequent litigants. Petitioner here has presented an original question of marked constitutional importance, and respectfully submits that a holding by this Court in accord with *Glover, Thomas,* and allied cases would unquestionably apply to him, based upon "sound policies of decision making, rooted in the command of Article III of the Constitution . . ." *Stovall* v. *Denno,* 388 U. S. at 301. The question of retroactive application does not occupy the Court at this time. Should the Court in a future case wish to limit any announced rule to cases heard after this decision, the Court certainly may do so. Nothing in the concept of retroactivity would appear to deny Gale Johnson the benefit of the Court's ruling on the alibi question presented, or to limit the Court in other future cases.

Petitioner disputes the propriety of a trial court shifting the burden of proof in a criminal case to the accused. His contentions in this respect form an isue of constitutional proportions. *Glover* v. *United States* condemns the erroneous allocation of the burden of proof wrought by the trial court's jury charge, and indicates that an instruction which does so is at war with the presumption of innocence, a basic tenet of Anglo-American jurisprudence.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RONALD L. CARLSON,
College of Law,
University of Iowa,
Iowa City, Iowa,
Counsel for Petitioner,

APPENDIX A.

UNITED STATES DISTRICT COURT,
Southern District of Iowa,
Eastern Division.

GALE H. JOHNSON,
Petitioner,
vs.
JOHN E. BENNETT, WARDEN,
Respondent.
} Civil No. 2-403-E.

ORDER.

This matter is now before the Court upon the petition of Gale H. Johnson for a writ of habeas corpus. A return has been filed by the respondent.

The petitioner has advanced six contentions in his petition. In essence, three of these contentions were raised by this petitioner in a previous petition which was denied by this Court on July 17, 1961. In the intervening years, however, several Supreme Court decisions, notably *Townsend* v. *Sain,* 372 U. S. 293 (1963) and *Fay* v. *Noia,* 372 U. S. 391 (1963), have significantly affected habeas corpus proceedings. This Court therefore will review all of the contentions raised in the instant petition.

Petitioner first contends that he was deprived of an important trial witness, Thomas Orsucci. The petitioner's trial commenced on November 13, 1934 and a verdict was returned on November 24, 1934. The sheriff serving sub-

poenaes upon witnesses for the petitioner's trial made a return on November 19, 1934 indicating that Thomas Orsucci was being detained in the Clarinda Institution for the Insane. The petitioner has filed an affidavit from this individual indicating that on November 20, 1934, he was being detained in the Polk County Jail. Informal inquiries have established that (1) the records at the Clarinda Institution indicate that a man by the name of Thomas Orsucci has never been a patient there and (2) the Polk County Jail records show that Thomas Orsucci was incarcerated in that jail from November 15, 1934 to December 8, 1934. Such facts appear to contradict the return made by the sheriff. As this Court indicated in a previous order, the petitioner's contention relating to Thomas Orsucci presents a due process question. The applicable law governing this problem was enunciated by the Supreme Court of the United States when it held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963).

The petitioner has filed an affidavit stating that Thomas Orsucci is now deceased, that the whereabouts of this individual was not known by him or his attorneys at the time of his trial and that the testimony of this witness would have been material to his defense.

The crucial question is whether the testimony of Thomas Orsucci was material to a determination of his guilt or punishment. In his affidavit of April 20, 1966, the petitioner makes the following statement:

> "The state's case consisted of circumstantial evidence, identification was made by two state witnesses, who had previously identified Thomas Orcussi. After further investigation it was shown a mistake was made and Mr. Orcussi was released.

> No one can deny the credibility of state witnesses would have been severely damaged, and the fact they had made a previous mistake of identification was extremely important. These facts, were never before the jury and completely unknown. The District Attorney's testimony will also substantiate these facts."

It thus appears that Mr. Orsucci's testimony would have been used in an attempt to impeach the credibility of certain state witnesses. It would not have been related to the substantive elements of the crime itself. Even if the petitioner's statement regarding Orsucci's testimony is accepted as being true, this Court does not feel that it was of sufficient materiality to petitioner's guilt or punishment to declare the suppression thereof a denial of due process.

The petitioner next contends that he was denied due process because not served with a document entitled "Notice of Additional Testimony" until shortly before his trial. This document was apparently served pursuant to Iowa Code § 780.10. This statutory provision requires that if such a document is necessary, it must be served at least four days before the commencement of the trial. The Notice given to the petitioner was dated November 7, 1934. See petitioner's exhibit D. The trial commenced on November 13, 1934. The four day requirement would appear to have been complied with. Even though the petitioner was confined in jail at the time the notice was served, he was represented by counsel. There was no due process violation in connection with this notice.

The petitioner's next two contentions concern perjured testimony at his trial and the introduction of certain exhibits without proper foundation. Both allegations appear to center around the testimony of Charles Ruggles. The testimony of this witness has previously been questioned before this Court. The petitioner previously introduced statements dated January 29 and 30, 1960 in which Mr.

Ruggles indicated that certain testimony he had given at the petitioner's trial was false. After conducting a hearing on an application to perpetuate the testimony of Mr. Ruggles, this Court granted the application on April 20, 1961. The deposition of Mr. Ruggles was then taken in San Bernadino, California on June 20, 1961. In this deposition which was taken in the presence of attorneys representing both the petitioner and the respondent, Mr. Ruggles expressly reaffirmed the testimony he had given at the petitioner's trial and denied the allegations contained in the statements of January 29 and 30, 1960. After again examining the statements and deposition of Mr. Ruggles and considering the conditions under which the same were obtained, this Court finds no basis in this portion of the petition for the granting of a writ of habeas corpus.

Petitioner also alleges that he is being unlawfully deprived of certain trial records. It appears that the reporter who transcribed the petitioner's trial is dead and his shorthand notes cannot be deciphered. It should be noted in this connection that the petitioner was represented by counsel at his trial and on his appeal. A 424 page abstract of the record was prepared in 1935 on behalf of the petitioner. A 125 page brief and a 12 page reply brief were also submitted by petitioner's counsel on the original appeal from his conviction. Under such circumstances, the fact that the petitioner cannot now obtain certain trial records clearly does not deprive him of due process of law. See *Norvell* v. *Illinois*, 373 U. S. 420 (1963); *Christopher* v. *District Court*, 255 Iowa 694, 123 N. W. 2d 892 (1963).

The petitioner's final contention is that due to a jury instruction given by the court at his trial, he was deprived of his right to be presumed innocent until proven guilty and thus deprived of due process of law. The instruction which is the basis for petitioner's contention is as follows:

"16. Evidence has been admitted on behalf of the

defendant of what is known as an alibi, which means that the defendant at the time that the alleged murder is charged to have been committed, was at another place so that he could not have committed the same. You are instructed that such a defense is proper and legitimate as any other, and you are also instructed that you scan the proof of alibi with care and caution, and all the evidence upon this point both for and against this claim of alibi should be scrutinized with care and carefully considered by the jury.

The burden is upon the defendant to prove this defense by a preponderance of the evidence, that is, by the greater weight or superior evidence. The defense of alibi to be entitled to be considered as established must show that at the very time of the commission of the crime the accused was at another place so far away, or under such circumstances that he could not with ordinary exertion have reached the place where the crime was committed so as to have committed the same. If by a preponderance of the evidence the defendant has so shown, the defense must be considered established and the defendant would be entitled to an acquittal. But if the proof of alibi has failed so to show, you will not consider it established or proved. The evidence upon that point is to be considered by the jury, and if upon the whole case including the evidence of an alibi, there is a reasonable doubt of defendant's guilt, you should acquit him."

This instruction essentially places the burden of proving an alibi by a preponderance of the evidence upon the defendant. The threshold question now before the Court is whether such an instruction is inconsistent with other instructions to the effect that the state must prove all the elements of the crime charged beyond a reasonable doubt and, if it is inconsistent, does such an inconsistency deprive a defendant of due process of law. It appears to the Court that, to some extent, an inconsistency exists when the "alibi" instruction placing the burden of proof by a preponderance of the evidence upon the defendant is given in

conjunction with other instructions which place the burden upon the state to prove the defendant's guilt beyond a reasonable doubt. An attempt to reconcile the varying burdens of proof is made when the jury is instructed that even if an alibi is not established by a preponderance, the evidence introduced for that purpose is sufficient to acquit the defendant if it establishes a reasonable doubt as to his guilt. Although this aids in clarifying the instructions as a whole, they are still somewhat confusing. To be violative of the due process clause of the fourteenth amendment, however, the instruction complained of by the petitioner herein must be such as would constitute a failure "to observe that fundamental fairness essential to the very concept of justice." *Lisenba* v. *California*, 319 U. S. 219, 236 (1941). While the jury instructions in the petitioner's trial contained an evident distinction in the quantum of proof required for establishing an alibi and for proving the guilt of the defendant, it is the view of this Court that the distinction is not of a sufficient magnitude to be violative of the due process clause. See *Leland* v. *Oregon*, 343 U. S. 790 (1952). Although the instruction involved herein may not be a model of clarity, it is not violative of the due process clause of the fourteenth amendment to the Constitution.

It might be worthwhile to note parenthetically that, even if it were determined that the alibi instruction was unconstitutional, there is serious doubt as to whether such a decision should be applied retrospectively. Since there is no need to explore in depth the problem of retroactivity as it applies to the constitutional problem now before the Court, suffice it to comment that under the teachings of *Linkletter* v. *Walker*, 381 U. S. 618 (1965) and *Tehan* v. *United States*, 34 U. S. L. Week 4095 (January 18, 1965), it is doubtful that a decision holding the alibi instruction involved herein to be unconstitutional should be given retroactive effect.

After carefully reviewing all of the documents which have been presented in connection with the instant petition, this Court concludes that no useful purpose would be served by conducting an evidentiary hearing at this time.

IT IS ORDERED that the petition of Gale H. Johnson, filed February 16, 1966, be and is hereby denied.

Dated this 29th day of March, 1966.

/s/ ROY L. STEPHENSON,
Chief Judge.

(This order bears a filing date of April 26, 1966, and is accordingly referred to as the order of that date in the attached petition.)

IN THE UNITED STATES DISTRICT COURT
for the Southern District of Iowa,
Central Division.

GALE H. JOHNSON,
No. 16614,
Petitioner,
vs.
JOHN BENNETT, Warden,
Iowa State Penitentiary,
Respondent.

Civil No.
7-1848-C-1.

ORDER.

This matter is now before the Court upon the petition of Gale H. Johnson for a writ of habeas corpus. The petition was originally filed on February 16, 1966. After receiving a response to an order to show cause and granting petitioner additional time for filing affidavits in support of his claims, the Court entered an order on April 26, 1966 denying the petition. An attorney, Mr. Norman Jesse, then entered an appearance on behalf of the petitioner and requested the Court reconsider its previous order and grant petitioner an evidentiary hearing upon his claims. The Court granted the request and, after petitioner moved for continuance of the hearing from the date it was originally scheduled, an evidentiary hearing was held on July 22, 1966. At the close of the evidence on that day, the hearing was continued and additional testimony was taken on August 30, 1966. Although previous to the hearing the Court limited the issues to be considered, the Court informed petitioner at the hearing that he could make an offer of

proof on anything he desired. At the close of the evidence in this matter, counsel for both parties requested permission to file written briefs. The final brief was filed on November 10, 1966.

An indictment was returned on September 25, 1934 by the Grand Jury of Des Moines County charging that on or about the 27th day of May, 1934, the petitioner herein, Gale H. Johnson, did willfully, unlawfully, feloniously, deliberately, premeditatedly and with malice of forethought kill F. W. Sauer. A plea of not guilty was entered to the indictment. On November 24, 1934, a jury found Gale H. Johnson guilty of second degree murder. The petitioner was sentenced to the penitentiary at Fort Madison, Iowa, for life on December 10, 1934.

The petitioner now contends that he is being unlawfully detained because his conviction was obtained by a denial of due process of law in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, in that:

> "A. He was denied an important trial witness when, pursuant to a Court Order, a subpoena was issued for Thomas Orsucci, and the Sheriff of Polk County failed to serve the same, but falsely informed the Court and defense that, 'Thomas Orsucci is in Clarinda institution for the insane.'
>
> B. He was denied sufficient notice and time to prepare for trial in connection with the matters contained in the Notice of Additional Testimony.
>
> C. His conviction was secured by the use of the perjured testimony of Drew Orton and Clarence Ruggles, and notes forged by them.
>
> D. State's Exhibits One and Two, being the notes above referred to, were admitted into evidence without foundation and contrary to the rules of evidence.
>
> E. He was denied the presumption of innocence by Instruction 16 or the 'alibi instruction.'
>
> F. He was denied his trial records after tendering fees and costs."

Claims E and F have been adequately discussed in the Court's order of April 26, 1966, and will not be reviewed at this time. Evidence relating to the other claims was presented at the hearing. These claims will be reviewed at this time.

There is circumstantial evidence now before the Court indicating that petitioner Johnson was deprived of the opportunity of calling Thomas Orsucci as a witness on his behalf at his trial.[1] Petitioner contends that the suppression of this witness constituted a denial of due process of law. As indicated in a previous order, the applicable law governing this problem was enunciated by the Supreme Court of the United States when it held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution," *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963).

Petitioner Johnson was convicted of the murder of a Burlington police officer. Although there were no witnesses to the actual shooting, two witnesses saw two men—one carrying a shotgun—walking briskly away from the scene of the crime immediately following the shooting. Thomas Orsucci was arrested and charged in connection with the slaying of the police officer. Orsucci was later released and the charges against him dismissed for lack of sufficient evidence. One of the witnesses who observed the two men near the scene indicated that Orsucci resembled one of the men, but was unable to make a positive identification.

1. The return on subpoenas from the sheriff of Polk County stated that "service has been secured upon all * * * except Thomas Orsucci is in Clarinda institution for insane." Thomas Orsucci also was known by the name of Thomas Saunders. The records of the Polk County jail indicate that a man by the name of Thomas Orsucci was incarcerated therein during petitioner's trial.

The other witness stated that Orsucci was not one of the men. However, both witnesses gave positive identifications that Johnson was the man carrying the shotgun. Petitioner urges that testimony from Thomas Orsucci concerning his arrest and subsequent release would have tended to impeach the testimony of the two identifying witnesses and the denial of such testimony constituted a violation of due process of law. This Court disagrees. Johnson was positively identified by two witnesses. The failure of these witnesses to identify the other man, even though one witness indicated that Orsucci resembled the second man, does not impeach their positive identification of Johnson. Under the circumstances, the Court cannot now find that Orsucci's testimony was evidence material to the guilt or punishment of Johnson.[2] Petitioner is entitled to no relief on his claim that he was deprived of an important trial witness.

Petitioner's remaining contentions center around the introduction of two notes at his trial and the testimony of Drew Orton and Clarence Ruggles. It is claimed that the notes were forged and the testimony of these witnesses was perjured. It is also urged that Johnson's trial attorney was not informed of the existence of the notes in time for him to prepare a proper defense on this aspect of the case. In connection with this latter contention, the Court has previously observed that the "Notice of Additional Testimony" served upon petitioner shortly before his trial complied with the statutory provisions of the Iowa Code § 780.10. Nevertheless, petitioner contends that his counsel was not given adequate time to prepare a defense to the evidence contained in the Notice—that being

2. It should also be noted that the affidavit of Thomas Orsucci stating that he "had knowledge of certain facts pertinent to his (petitioner's) defense" was executed February 11, 1949. No attempt or request was made to take Orsucci's deposition or perpetuate his testimony. Orsucci died in 1965.

the testimony of Ruggles and Orton. Petitioner therefore claims that he was denied effective assistance of counsel. It must be noted that petitioner's able trial counsel visited the Fort Madison penitentiary one day in advance of trial in an attempt to investigate the evidence contained in the Notice. The investigation appears to have been successful in that the defendant's trial witnesses included L. E. Yates, a convict at the penitentiary. Yates testified that the witnesses Orton and Ruggles were trying to frame Johnson and that the notes introduced into evidence by the State purportedly written by Johnson were fakes. The jury apparently gave little credence to Yates' testimony. In view of the defense evidence attempting to rebut the evidence contained in the Notice, this Court does not accept petitioner's contention that he was deprived of due process of law because he was not given sufficient notice in connection with certain of the prosecution's evidence.

Petitioner's final contention is that his conviction was obtained by the use of perjured testimony and false documents. If such evidence were knowingly used by the prosecution, such use would constitute a denial of due process. *Napue* v. *Illinois*, 360 U. S. 264 (1959). The petitioner has not in this instance established that the prosecution knowingly participated in the use of such evidence. Thus, the dual questions now to be determined are "were perjured testimony or false documents introduced into evidence at petitioner's trial?" And "if such evidence was received, did it result in a trial which was fundamentally unfair?" *Kyle* v. *United States*, 297 F. 2d 507 (2d Cir. 1961). There is undoubtedly conflicting evidence as to whether the witnesses Ruggles and Orton committed perjury and whether the notes were false. This conflict was raised in the trial itself through the testimony of L. E. Yates. Petitioner has filed several affidavits tending to support his contention that perjured testimony and false

evidence were used to obtain his conviction. The affidavits of Clarence Ruggles are the ones most strongly supporting petitioner's contention. However, these affidavits have been expressly repudiated by Ruggles in a deposition taken at the direction of this Court. In addition to the affidavits, petitioner has presented the testimony of a handwriting expert to the effect that the notes introduced at the trial were not written by Johnson and the handwriting expert who testified at the trial, Mr. Faxon, was erroneous in his conclusion that they were. Respondent's handwriting expert concurs in this view. In this connection, it is appropriate to point out that the trial court instructed the jury on this aspect as follows:

Instruction 17:

Our statute provides that evidence respecting handwriting may be given by experts by comparison, or by comparison by the jury with writing of the same person which are proved to be genuine. Evidence of this character has been introduced upon this trial, and it is proper for the jury to carefully consider the testimony of the witness and to say how much weight shall be given to such testimony, taking into consideration the amount of experience, knowledge and skill possessed by the witness about the matter concerning which his opinion has been given. But, while it is proper to consider such evidence, it is proper to remark that it is the lowest order of evidence, or evidence of the most unsatisfactory character. However upon this question you will compare the writings in dispute with writing of the defendant which you may find proved to be genuine, and in considering this question and doing this you may and should use your own judgment, from comparison of such writing, with the writings in controversy in determining whether or not the defendant actually wrote such alleged writings; and it is your duty and privilege to give your own comparison and knowledge gained from such comparison such weight as you think it entitled to, in

connection with the other evidence admitted upon the trial upon this question.

Although petitioner has raised some doubt as to the validity of the notes introduced at his trial, he has failed to establish to the satisfaction of this Court that his conviction was obtained through the use of perjured testimony. Moreover, after reviewing the abstract of record of petitioner's trial, this Court is convinced that the record indicates that petitioner's trial counsel, Mr. Doran and Mr. Finley were able, vigorous and persistent in presenting the case for the defense. Petitioner was afforded a trial consistent with fundamental concepts of justice.

IT IS ORDERED that the petition of Gale H. Johnson for a writ of habeas corpus be and is hereby denied.

Dated this 6th day of December, 1966.

/s/ ROY L. STEPHENSON,
Chief Judge.

APPENDIX B.

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 18,744.

GALE H. JOHNSON,
Appellant,
vs.
JOHN E. BENNETT, Warden Iowa State Penitentiary,
Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

(November 28, 1967.)

Before VAN OOSTERHOUT, MATTHES and MEHAFFY, *Circuit Judges.*

VAN OOSTERHOUT, *Circuit Judge.*

This is an appeal by Gale H. Johnson, hereinafter called defendant, from final order of the district court entered after a full and fair evidentiary hearing denying his petition for a writ of habeas corpus. The record shows that the defendant is presently serving a life sentence in the Iowa penitentiary as a result of his conviction by a jury of second degree murder and the permissible life sentence imposed under Iowa law as a result of such conviction.

The conviction was affirmed upon appeal; rehearing was denied. *State* v. *Johnson,* 264 N. W. 596; 267 N. W. 91. The trial court has filed two opinions in this case, one on April 26, 1966, and a final opinion on December 6, 1966. This appeal is from the orders of dismissal based upon such opinions.

The trial court issued a certificate of probable cause under 28 U. S. C. A. § 2253 which concludes, "It is ordered that the application of petitioner Gale H. Johnson for the issuance of certificate of probable cause is hereby granted." In the discussion preceding the order, the trial court stated that the certificate is being granted on the basis of asserted violation of constitutional rights arising out of the alibi instruction and that other issues involve factual determinations which would not warrant a certificate. Upon the basis of such statements, the State contends that this appeal is limited to the alibi issue. We do not agree. The order portion above quoted contains no restriction upon issues to be considered upon appeal and it is our view that the order granting the certificate does not limit the issues which defendant may raise upon this appeal. While we have considerable doubt whether the trial court can limit issues to be considered upon appeal by limitations in the certificate, we do not reach such issue here.

The jurisdictional issue of exhaustion of state remedies is not raised by either party. The record before us is not as satisfactory on this issue as we would like to have it. It does appear however that defendant has filed three habeas corpus applications in the appropriate state district court and that he has also filed an original habeas corpus application with the Supreme Court of Iowa, presumably raising the issues here asserted. All such petitions were denied without an evidentiary hearing. The Iowa Supreme Court petition was denied on January 6, 1966, by a summary order stating in substance that the legality of peti-

tioner's imprisonment had been determined by the affirmance of his conviction upon direct appeal and by orders denying prior petitions for habeas corpus. So far as we can ascertain, neither the Iowa legislature nor the Iowa Supreme Court has liberalized the rules for consideration of post-conviction attacks asserting federal constitutional rights have been violated in the proceeding resulting in the conviction. As stated by the Supreme Court in *Case* v. *Nebraska,* 381 U. S. 336 (concurring opinions), it is highly desirable that the states solve their own problems by providing an adequate means of review of post-conviction attacks asserting substantial violation of federal constitutional rights. See *Baines* v. *Swenson,* 8 Cir., ... F. 2d ..... (Oct. 31, 1967).

Upon the record before us, we believe there has been a sufficient showing of exhaustion of available state remedies and that jurisdiction exists in the trial court to consider the petition and in this court to entertain the appeal. See *Fay* v. *Noia,* 372 U. S. 391; *Townsend* v. *Sain,* 372 U. S. 293.

We now proceed to the consideration of the issues presented by this appeal. Defendant for reversal relies upon the following asserted errors:

I. The use of false evidence against the accused is in conflict with the due process clause of the Fourteenth Amendment and vitiates defendant's conviction.

II. Suppression of the testimony of Orcussi, an important witness, constitutes a denial of due process.

III. The alibi instruction given, which shifts the burden of proof of alibi to defendant, destroys the fundamental presumption of innocence.

IV. The court erred in determining petitioner was afforded a trial consistent with the fundamental concept of justice.

The facts pertinent to this litigation are set out in the opinion of the Supreme Court of Iowa in *State* v. *Johnson*, supra, and in the memorandum opinions of the trial court. We shall limit our factual recital to the bare essentials necessary for the consideration of the issues presented.

It is established beyond question that a police officer was fatally shot about 5:30 a.m. on May 27, 1934, while investigating a burglary at a Burlington store. Defendant at his trial was connected with the murder by two types of evidence, identification testimony and testimony relating to an alleged admission by defendant. The two witnesses, Chumney and Emerson, who resided near the shooting area, testified they heard the fatal shot and that from their homes they saw two persons, one of whom was the defendant, walking rapidly down the street away from the murder scene and enter and drive away in a black Ford automobile, and that the defendant was carrying a sawed off shot gun. The credibility of their testimony that they were able to identify the defendant, whom they had not previously known, in the short available interval in light of the intervening distance and obstructions, was sharply challenged at the trial.

Defendant did not testify himself but presented eight witnesses who testified that defendant was in Des Moines, one hundred and sixty-four miles distant, at the time of the shooting. If the alibi witnesses' testimony is accepted, defendant could not have committed the crime. We agree with the determination of the Supreme Court made on the appeal that the credibility of the identification witnesses presented a fact issue for the jury.

Defendant was kept at the penitentiary for safekeeping prior to his trial. Two fellow prisoners, Ruggles and Orton, testified at the trial that they heard defendant admit to another prisoner, Yates, that defendant had killed the officer. Yates denied that such statement was ever

made to him and there is also evidence that defendant was at all times under close guard and would have been unable to communicate with Yates. Such testimony is referred to in the affirming opinion of the Iowa Supreme Court as testimony supporting the conviction.

At the trial, Ruggles and Orton claimed to have intercepted notes purportedly written by the defendant for smuggling outside the institution.

I.

Defendant, upon the basis of *Miller* v. *Pate*, 386 U. S. 1, and *Mooney* v. *Holohan*, 294 U. S. 103, urges that the use of false evidence against him violates the due process clause of the Fourteenth Amendment. Such statement is too broad. The Court in *Miller* v. *Pate* thus states the applicable rule:

> "More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. *Mooney* v. *Holohan*, 294 U. S. 103. There has been no deviation from that established principle. *Napue* v. *Illinois*, 360 U. S. 264; *Pyle* v. *Kansas*, 317 U. S. 213; cf. *Alcorta* v. *Texas*, 355 U. S. 28. There can be no retreat from that principle here." 386 U. S. 1, 7.

In the *Miller* case, the Court found that the prosecutor at the time of trial knew the incriminating shorts were stained with paint and the stains were passed off at the trial as blood stains.

Napue v. *Illinois*, 360 U. S. 264, extends the rule to the situation where the prosecution, although not soliciting false evidence, "allows it to go uncorrected when it appears."

So far as we have been able to ascertain, all the Supreme Court cases setting aside convictions for want of due

process by reason of the reception of false testimony are based upon the knowledge of the prosecutor that the testimony received is false or knowledge that material evidence has been suppressed. Such would appear to be a proper limitation of the rule. If convictions could be set aside years after they became final merely upon proof that some testimony of a witness proved to be false, there would be no finality to convictions and the orderly administration of justice would be unduly hampered.

There is no substantial evidence here to support a finding that the prosecutor knowingly used false testimony or that he permitted false testimony received to stand uncorrected. It is the claim of the defendant that certain notes which Orton and Ruggles intercepted were improperly received in evidence upon the basis that they were in defendant's handwriting. There is evidence that such notes were designed for smuggling out of the prison and contained language such as, "Have wife tell same story. Have nothing on me. Do what you said you would for me." and, "They have nothing on any one. All they have to do is just keep still." Mr. Faxon, a recognized handwriting expert from Chicago, testified at the 1934 trial that such notes were in defendant's handwriting. Defendant in the present proceeding produced expert testimony that the writing on the notes was not his, and the State's present expert agrees with such testimony. There is nothing in the record to indicate that Mr. Faxon was not expressing his honest opinion or that the prosecution did not in good faith rely upon his opinion. The difference in the expert handwriting testimony may well be based upon advancements made in the science of handwriting analysis in the years that have intervened since the 1934 trial.

A further claim is made that Ruggles' testimony at the trial is false. Some support is found for this in affidavits provided by Ruggles to an attorney employed by the de-

fendant. Subsequently by court order Ruggles' testimony was taken and the transcript thereof is in evidence. In such deposition, Ruggles repudiates the statements made in the affidavit and the burden of his testimony is that his testimony at the trial was correct.

We agree with the trial court's determination that defendant's conviction is not tainted by the knowing use of perjured testimony by the prosecution or by the suppression by the prosecution of material evidence.

II.

By reason of defendant's poverty, the court directed that certain witnesses, including Thomas Orcussi, be subpoenaed for the defendant at State expense. The sheriff at Burlington assumed responsibility for the service of such subpoenas by sending them to the sheriff of Polk County for service upon the witnesses residing in Des Moines. With respect to Orcussi, the subpoena was returned unserved with the notice, "Thomas Orcussi is in Clarinda Institute for Insane." No further attempt was made to secure Orcussi, apparently in reliance upon such statement, and Orcussi did not appear as a witness at defendant's trial.

In the present proceeding, the Polk County jail records were introduced in evidence and they disclose that Orcussi was in the Polk County jail serving a thirty-day sentence for intoxication during the period the subpoena was in the hands of the Polk County sheriff for service. The jail records show nothing with respect to the transfer of Orcussi to a mental hospital. The trial court in its opinion observes that his independent investigation discloses that the records at the Clarinda Institution do not show that Orcussi was ever received at such institution. Such evidence establishes a prima facie case that the return of the

Polk County sheriff is false. No explanation has been made by the State. Fairness requires an observation that persons who might be in a position to explain the return are no longer available. The record indicates that the prosecuting attorney had no knowledge of the falsity of the return, and defendant as a witness states that he has no evidence to the contrary. On this issue, the trial court states:

> "[T]he applicable law governing this problem was enunciated by the Supreme Court of the United States when it held that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963)."

The State does not question the soundness of the law above quoted. An interesting question is raised as to whether "the prosecutor" is chargeable with the suppression of evidence for which the sheriff of another county of the state, apparently having no connection with the prosecutor, is responsible. We need not reach such problem here, as we agree with the trial court's determination that no prejudice resulted from the failure to have Orcussi as a witness at the trial.

An affidavit of Orcussi dated February 11, 1949, is in evidence wherein he states that he was in the Polk County jail at the time of defendant's trial and that he was willing to testify as a witness on defendant's behalf and that, "I have knowledge of certain facts pertinent to the defense." Orcussi died in 1965. Orcussi never made any disclosure of what information, if any, he had. Defendant as a witness in the present proceeding stated that he visited with Orcussi while Orcussi was a fellow prisoner in the penitentiary subsequent to the trial; that Orcussi

was arrested on the same murder charge as the one upon which defendant was convicted; that Orcussi was held for a time and "that he had been partially identified or had been identified to some extent but I am not certain by what witnesses." The only witnesses at the trial who identified defendant as being near the scene of the crime were Chumney and Emerson. The prosecuting attorney, Mr. Dailey, as a witness in the present proceeding testified that Emerson thought Orcussi looked like the man he saw with the defendant but that he was unable to positively identify him and that the other identifying witness, Chumney, positively stated that Orcussi was not the man. Orcussi was held for a time for investigation but the proceeding against him was dismissed before defendant's trial for want of evidence sufficient to convict.

Thus it would appear that the only possible use of Orcussi as a witness, as far as the record reveals, would be to attempt to impeach the witness who identified the defendant. Orcussi was never identified by Chumney and was not positively identified by Emerson and hence it is difficult to see where his testimony would have been of any value to the defendant. Defendant's counsel could have obtained this same evidence at the trial by cross-examination of Emerson and Chumney. No significant reference to Orcussi was made during the trial.

We agree with the trial court's conclusion that "the court cannot now find that Orcussi's testimony was evidence material to the guilt or punishment of Johnson. Petitioner is entitled to no relief on his claim that he was deprived of an important trial witness."

III.

Defendant next makes a twofold attack on the alibi instruction given by the court. The first objection is to the language in the instruction directing the jury to look upon the alibi defense with caution. Such attack was considered and rejected upon direct appeal. The attack does not reach constitutional proportions and is not entitled to consideration here.

The second and more serious attack is that the instruction given deprives the defendant of the presumption of innocence in that it improperly places the burden of proof of alibi upon the defendant. The instruction given does place the burden of proof on the defendant to establish his alibi defense by a preponderance of the evidence and then goes on to say, "The evidence upon this point is to be considered by the jury, and if upon the whole case including the evidence of an alibi, there is a reasonable doubt of defendant's guilt, you should acquit him."

As pointed out by the defendant, this court disapproves a similar instruction in *Glover* v. *United States,* 8 Cir., 147 Fed. 426, upon the basis that the instruction improperly shifts the burden of proof to the defendant. We stated:

> "It loses sight of the fundamental rule in criminal procedure that the defendant is presumed to be innocent of the offense with which he is charged; that this is a continuing presumption which attends him like a guarding spirit throughout the ordeal of his trial, and imposes upon the prosecution the burden of overcoming such presumption by such weight of evidence as will satisfy the minds of the triers beyond a reasonable doubt of the defendant's guilt. This reasonable doubt in his favor applies to the evidence in its entirety and necessarily to any part of it." 147 Fed. 426, 431.

We also determined that an addition, similar to the last sentence of the instruction here given, did not cure the prior portion of the instruction placing the burden upon the defendant to prove alibi and that the incongruous instructions "were well calculated to confuse the understanding of the jury as to how they should apply the rule of reasonable doubt."

The Supreme Court has not passed upon the validity of this type of instruction but the great weight of authority supports the view that such an instruction is erroneous. See *Thomas* v. *United States*, 9 Cir., 213 F.2d 30; Comment, 49 Iowa L. Rev. 590.

We note that the Iowa court has consistently upheld an alibi instruction similar to that given here although the court is sharply divided upon this issue. *State* v. *LaMar*, 151 N. W. 2d 496; *State* v. *Stump*, 119 N. W. 2d 210. The federal district court, while finding the alibi instruction confusing and not a model of clarity, on the basis of the instructions as a whole determined that the instruction did not result in a fundamental unfairness of sufficient magnitude to be violative of the due process clause, citing *Leland* v. *Oregon*, 343 U. S. 790. It is quite true that in other instructions the court stressed the presumption of innocence, reasonable doubt and the necessity of the State proving all essential elements of the case beyond a reasonable doubt. It is difficult to say on the basis of the instructions as a whole that the defendant was deprived of any substantial constitutional right.

When this case was tried in 1934, the instruction challenged had the full backing of the Iowa Supreme Court. This case was finally adjudicated long before the Supreme Court determined federal constitutional rights guaranteed by the first ten amendments are to be applied to state proceedings by reason of the Fourteenth Amendment. The

trial court based its decision in part on cases denying retroactive application to newly determined constitutional principles. We are not squarely confronted with retroactivity here as there has been no authoritative decision by the Supreme Court determining the challenged instruction violates federally guaranteed constitutional rights. However, the reasoning of the Supreme Court cases dealing with retroactivity lends support to the determination that the conviction should not be set aside by reason of the alibi instruction. The cases hold that retroactive application of newly announced constitutional determinations to state prosecutions shall be determined on a case-to-case basis. In a number of situations, retroactive application has been denied. Thus in *Linkletter* v. *Walker,* 381 U. S. 618, the rule of *Mapp* v. *Ohio,* 367 U. S. 643, holding that illegally seized evidence could not be used in a state criminal proceeding, was denied retroactive application.

In *Johnson* v. *New Jersey,* 384 U. S. 719, the Court held that the rules of *Escobedo* v. *Illinois,* 378 U. S. 478, and *Miranda* v. *Arizona,* 384 U. S. 436, with respect to police interrogation without proper warning, should not be applied retroactively. In *Tehan* v. *Shott,* 382 U. S. 406, the Court held that the pronouncement of *Griffin* v. *California,* 380 U. S. 609, proscribing adverse comment on defendant's failure to testify by prosecutors and judges in state criminal trials, is not to be given retroactive effect. There are other cases, such as *Gideon* v. *Wainwright,* 372 U. S. 335 (right to counsel), and *Jackson* v. *Denno,* 378 U. S. 368 (coerced confession), where newly adopted constitutional rules have been given retroactive effect. The tests with respect to retroactivity are fully discussed in the foregoing cases.

No challenge was made to the alibi instruction on constitutional grounds in the defendant's trial resulting in his conviction or in his appeal therefrom. We have little doubt that such challenge, if then made, would have been rejected. We do not believe that the challenge now made, even in the event it is entitled to be upheld under present day standards, would be given retroactive application to the 1934 conviction.

IV.

Lastly, defendant urges that he has not been afforded a fair trial. In addition to the specific complaints heretofore discussed, defendant claims he was prejudiced by the prosecutor's vigorous argument pointing out that he did not take the witness stand to deny the charge; by unfavorable publicity at the time of the trial; and other improper conduct on the part of the prosecution. We are here considering a collateral attack upon a conviction, not a direct appeal. Only errors reaching constitutional dimensions can be considered and such errors must be fairly raised and established by the defendant.

The errors in this division were not raised by the defendant's petition and were not presented to or considered by the trial court. Issues not properly raised in the trial court cannot be considered upon appeal. The most substantial issue, which relates to comment on defendant's failure to testify, is foreclosed by *Tehan* v. *Shott*, supra.

Defendant was tried before Judge Hale, a fair and able judge who later served with distinction on the Supreme Court of Iowa. Defendant was represented by capable lawyers of his own choosing both at the trial and upon

the appeal. All issues raised at his trial and upon appeal received fair consideration upon the basis of the applicable legal standards then existing. Defendant has failed to establish the violation of federal constitutional rights of such magnitude as to entitle him to a new trial.

The judgment is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C.

Instruction number 16 at petitioner's trial, objected to by the defense, read as follows:

"Evidence has been admitted on behalf of the defendant of what is known as an alibi, which means that the defendant at the time that the alleged murder is charged to have been committed was at another place so that he could not have committed the same. You are instructed that such defense is proper and legitimate as any other, and you are also instructed that you scan the proof of alibi with care and caution, and all the evidence upon this point both for and against this claim of alibi should be scrutinized wth care and carefully considered by the jury.

"The burden is upon the defendant to prove this defense by a preponderance of the evidence, that is, by the greater weight or superior evidence. The defense of alibi to be entitled to be considered as established must show that at the very time of the commission of the crime the accused was at another place so far away, or under such circumstances that he could not with ordinary exertion have reached the place where the crime was committed so as to have committed the same. If by a preponderance of the evidence the defendant has so shown, the defense must be considered established and the defendant would be entitled to an acquittal. But if the proof of alibi has failed so to show, you will not consider it established or proved. The evidence upon this point is to be considered by the jury, and if upon the whole case including the evidence of an alibi, there is a reasonable doubt of defendant's guilt, you should acquit him."

Original trial record 374-5.

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted]

GALE H. JOHNSON,

Petitioner,

vs.

JOHN E. BENNETT, WARDEN, IOWA STATE PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

PETITION FOR CERTIORARI FILED FEBRUARY 19, 1968.

CERTIORARI GRANTED APRIL 1, 1968.

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1131.

GALE H. JOHNSON,

Petitioner,

vs.

JOHN E. BENNETT, WARDEN, IOWA STATE PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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APPENDIX.

MEMORANDUM OF PAPERS FILED, AND DATE OF FILING

Closed 12-6-66

GALE H. JOHNSON, No. 16614,
Petitioner,
vs.
JOHN BENNETT, Warden, Iowa State Penitentiary,
Respondent.

No. 7-1848-C-1
Central Division

Date

1. Feb. 16, 1966—Petition for Writ of Habeas Corpus.
2. Feb. 18, 1966—Order to Show Cause.
3. Feb. 23, 1966—Motion for An Enlargement of Time.
4. Feb. 24, 1966—Order granting time for filing Return to Mar. 4, 1966.
5. Mar. 4, 1966—Return.
6. Mar. 4, 1966—Affidavit of Service.
7. Mar. 4, 1966—Respondent's Brief in Support of Return.
8. Mar. 16, 1966—Traverse with Brief & Exhibits C, D & E. (Exhibits loose.)
9. Mar. 18, 1966—Motion to Set date of evidentiary hearing.
10. Apr. 6, 1966—Order granting 30 days to file affidavits or deposition, etc.

11. Apr. 20, 1966—Affidavit.
12. Apr. 26, 1966—Order denying Petition for Writ of Habeas Corpus.
13. May 6, 1966—Appearance of Attorneys for Petitioner.
14. May 6, 1966—Application for Extension of Time.
15. May 6, 1966—Order Granting 10 days in which to file motions.
16. May 16, 1966—Motion to Reconsider and Grant Hearing.
17. May 24, 1966—Order granting petitioner 30 days to furnish report.
18. June 17, 1966—Certified copy of Order transferring Proceedings from Eastern Division to Central Division and for hearing on June 29, 1966, at 9:30 A.M.
19. June 24, 1966—Application for continuance of evidentiary hearing.
20. June 24, 1966—Order Evidentiary Hearing continued to 7-22-66, 9:30 a.m.
20½. July 22, 1966—Ptnr's. Motion for Full, Fair, Evidentiary Hearing.
21. July 22, 1966—Clerk's Court Minutes Re: Evidentiary Hearing.
21½. Aug. 16, 1966—Order Continuation of Evidentiary Hearing, 8-30-66, 10:30 a.m.
22. Aug. 29, 1966—Civil Subpoena, John A. Dailey with Mar's. Ret.
23. Aug. 30, 1966—Clerk's Court Minutes Re: Continuation of Evidentiary Hearing.
24. Sept. 2, 1966—Ptnr's. Application for Extension of Time to Prepare Brief.
25. Sept. 2, 1966—Order Granting Ptnr. Add'l. 14 Days to File Written Argument & Brief.

26. Sept. 21, 1966—Ptnr's. Brief and Argument (Del'd. to Judge), with Ptnr's. Statement of Facts attached.
27. Sept. 29, 1966—Respondent's Application for an Extension of Time.
28. Sept. 30, 1966—Order Respondent granted add'l. 3 weeks to file brief.
29. Oct. 19, 1966—Respondent's Application for Extension of Time to File Brief.
30. Oct. 19, 1966—Respondent's Affidavit of Service Re: Application for Extension of Time.
31. Oct. 21, 1966—Order Extending Respondent's Time to file Brief to 11-10-66.
32. Nov. 10, 1966—Respondent's Brief and Argument.
33. Nov. 10, 1966—Affidavit of Service.
34. Dec. 6, 1966—Order Denying Petition for Writ of Habeas Corpus.
35. Dec. 20, 1966—Motion to Proceed with Petitioner acting as his Own Counsel.
36. Dec. 20, 1966—Letter Re: Service of Above.
37. Dec. 23, 1966—Ptnr's. Application for Certificate of Probable Cause.
38. Jan. 4, 1967—Order Granting Ptnr's. Application for Certificate of Probable Cause.
39. Jan. 6, 1967—Petitioner-appellant's Notice of Appeal.
40. Jan. 6, 1967—Designation of Record on Appeal.
41. Jan. 18, 1967—Petitioner's Application for Order.
42. Jan. 19, 1967—Order denying Application for Order for rehearing, etc.

IN THE UNITED STATES DISTRICT COURT

For the Southern District of Iowa

Eastern Division

Gale H. Johnson, 16614,
Petitioner,

vs.

John Bennett, Warden, Iowa State Penitentiary,
Respondent.

Case No. 2-403-E
Civil

PETITION FOR WRIT OF HABEAS CORPUS UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF IOWA

Persons in State Custody

(Filed February 16, 1966)

1. Place of detention: State Penitentiary, Fort Madison, Iowa.
2. Name and location of court which imposed sentence: Des Moines County District Court, Burlington, Iowa.
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
   (a) Indictment returned Sept. 22, A. D. 1934, Case No. 4027.
   (b) .....
   (c) .....

4. The date upon which sentence was imposed and the terms of the sentence:
   (a) Sentenced December 10, 1934, Second Degree Murder, life imprisonment at hard labor.
   (b) .....
   (c) .....
5. Check whether a finding of guilty was made:
   (a) after a plea of guilty.....
   (b) after a plea of not guilty: Yes.
   (c) after a plea of nolo contendere.....
6. If you were found guilty after a plea of not guilty, check whether that finding was made by:
   (a) a jury: Yes.
   (b) a judge without a jury.....
7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes.
8. If you answered "yes" to (7), list:
   (a) the name of each court to which you appealed: Appeal was taken to Iowa Supreme Court (no others).
      i. .....
      ii. .....
      iii. .....
   (b) the result in each such court to which you appealed:
      i. Affirmed, Iowa Supreme Court.
      ii. .....
      iii. .....
   (c) the date of each such result:
      i. January 14, 1936 Iowa Supreme Court.
      ii. .....
      iii. .....

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. .....

ii. .....

iii. .....

9. If you answer "no" to (7), state your reasons for not so appealing:

(a) .....

(b) .....

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Petitioner alleges he was deprived of an important trial witness, in violation of 6th Amend., and therefore was denied "Due Process" of the 14th Amendment of the U. S. Constitution.

(b) Petitioner alleges he was denied sufficient "Notice" and time to secure evidence, investigate and prepare his defense, in violation of "Due Process" provisions of the 14th Amendment of the U. S. Constitution.

(c) Petitioner alleges a conviction secured by use of perjured testimony, a violation of "Due Process," of the 14th Amendment, U. S. Constitution.

(d) Petitioner alleges State's exhibits 1 and 2, were used illegally, unlawfully, contrary to *all* known rules of evidence, and "Due Process" and is violation of the 14th Amendment of the U. S. Constitution.

(e) Petitioner alleges he was denied the "presumption of innocence" right accorded to accused in Iowa trial procedure, thus violating Due Process of the 14th Amendment of the U. S. Constitution.

(f) Petitioner alleges he is denied his trial records unlawfully. The records are needed. And the denial is a violation of Due Process, 14th Amend., U. S. C.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) The accused applied to the trial Court, which issued a subpoena for Thomas Orsucci, Des Moines, Iowa, and ordered the sheriff to serve same. *Service was never made.* This witness was available, well known to Sheriff, who falsely informed the Court and the defense that "This witness is in the Clarinda Hospital for the insane." Petitioner charges the Sheriff's false report was a concoction carefully worded for the express purpose of thwarting any defense efforts to bring into Court this important trial witness for the defense.

(b) Petitioner states a "Notice of additional testimony" was served upon accused shortly before trial, that he was confined in a jail cell, a stranger, friendless, in a city far from friends and attorney, and insufficient time to even write a letter and get an answer. The Notice was a general instrument, and did not contain the facts necessary to prepare a defense. In fact the Notice was out of time as required by Iowa Statutes. It developed at the trial this evidence was in the hands of the County Attorney months before the case was submitted to the Grand Jury and withheld from them. A continuance was refused.

(c) Petitioner was confronted with perjury, by two convicts Drew Orton and Clarence Ruggles, in fact their entire stories were fabricated, also they forged and produced at least two "notes" which

are State's exhibits 1 and 2. Clarence Ruggles has since admitted testifying falsely.

(d) Petitioner states trial exhibits 1 and 2, were entered into the case without foundation. Clarence Ruggles testified he got the exhibits *from other* convicts, one named Lewis and the other Clell Conyers. Ruggles has since repudiated his testimony concerning the Notes, by affidavit and Deposition. Drew Orton claimed the Notes were passed to him by Ruggles. Both Lewis and Conyers were not presented as witnesses by the State. It is a sorry situation, a prosecutor making numerous visits to the nearby prison seeking information and evidence, offering them money, and then contriving and introducing forged Notes without any foundation *and these are facts, Trial record facts.*

(e) Petitioner's defense was an alibi, and the Court instructed the jury that the "burden of proof" was shifted to the accused, to such an extent the Alibi had to be proven beyond a reasonable doubt. This burden was increased by vicious, improper examination of defense witnesses so that all semblance of a fair trial and Constitutional rights thereto were violated.

(f) Petitioner applied and tendered fees and costs to the proper Clerk of Court and was told the Reporter was dead, and that although his trial "shorthand notes" existed, they could not be transcribed. Petitioner then applied to the Hon. Judge Newell, Des Moines County District Court, again the Clerk of Court refused to furnish the records. The matter was then taken to the Iowa Supreme Court, resulting in an order upholding the Clerk of Court in refusing to supply the record. These events

and application all took place in late summer and fall of 1965.

12. Prior to this petition have you filed with respect to this conviction:
    (a) any petitions in State or Federal Courts for habeas corpus? Yes.
    (b) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? Yes.
    (c) any other petitions, motions or applications in this or any other courts? Yes.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
    (a) the specific nature thereof:
        i. Two Habeas Corpus, to Iowa Supreme Court.
        ii. Three Habeas, 1 Motion, Lee County District Court.
        iii. One Habeas Corpus, to this Federal District Court.
        iv. Two Petitions for Deposition, Civil 1-240 and Civil 1-248.
    (b) the name and location of the court in which each was filed:
        i. Iowa Supreme Court, State House, Des Moines, Iowa.
        ii. Lee County District Court, Fort Madison, Iowa.
        iii. U. S. District Court, So. Div., Des Moines, Iowa.
        iv. U. S. District Court, So. Div., Des Moines, Iowa.
    (c) the disposition thereof:
        i. Both denied without hearings.

ii. All three denied without hearings.
iii. Denied without hearing, No. 1-261.
iv. Civ. #240 Denied—Civil 1-248 Granted.

(d) the date of each such disposition:
i. July 29, 1948. 2nd Petition, Jan. 6th, 1966.
ii. #11063, June 22, 1949—#11085, July 28, 1949 #11092, August 4, 1949. Motion Denied, June 9, 1965.
iii. Civil No. 1-261, July 17, 1961.
iv. Depositions: Civil #1-240 Denied Dec. 22, 1960. Civil #1-248 Granted May 22, 1961.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
i. .....
ii. .....
iii. .....
iv. .....

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, if any petition, motion or application which you have filed? Yes.

15. If you answered "yes" to (14), identify

(a) which grounds have been previously presented:
i. All herein, A, B, C, D, E, F. All were filed to Ia. Supreme Court.
ii. Allegations A and C, herein were filed to this U. S. Court. See #1-261 of July 17, 1961.
iii. .....

(b) the proceedings in which each ground was raised:
i. Habeas Corpus, Case No. 1-52101, filed in Iowa Supreme Court, Jan. 4, 1966.
ii. Habeas Corpus, Case No. 1-261, July 17, 1961.
iii. .....

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) .....

(b) .....

(c) .....

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes.

(b) your trial, if any? Yes.

(c) your sentencing? Yes.

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes.

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i. F. S. Finley, Lant Doran, both trial lawyers, both deceased.

ii. Mr. Bell, Des Moines, Ia. deceased.

iii. Mr. Lathrop, Atty., Omaha, Nebraska.

iv. Henrey Wormley, Atty., Des Moines, Iowa.

(b) the proceedings at which each such attorney represented you:

i. Trial Lawyers, Mr. Doran, trial and appeal.

ii. 1st Habeas Corpus to Iowa Supreme Court.

iii. Deposition, this U. S. District Court. Civil 1-240, year 1960.

iv. Deposition, this U. S. D. Court. Civil 1-248, year 1961.

19. If you are seeking leave to proceed *In forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? .....

(Petitioner states it is unnecessary to proceed in Forma Pauperis.)

GALE JOHNSON,
Signature of Petitioner.

STATE OF IOWA,
COUNTY OF LEE. } ss.

Gale Johnson, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

GALE JOHNSON,
Signature of Affiant.

Subscribed and Sworn to before me this 15th day of February, 1966.

RALPH D. MOEHN,
(SEAL) *Notary Public.*

My commission expires July 4, 1966.

IN THE SUPREME COURT OF IOWA

State House, Des Moines, Iowa

GALE H. JOHNSON,
Petitioner,
vs.
JOHN BENNETT, Warden, Iowa State Penitentiary, Fort Madison, Iowa
&
STATE OF IOWA,
Respondents.

Case No. 1-52101.

PETITION FOR WRIT OF HABEAS CORPUS IN THE SUPREME COURT OF IOWA,

Des Moines, Iowa

(Filed January 4, 1966)

JURISDICTIONAL STATEMENT.

This petitioner, Gale Johnson is well aware of Iowa Habeas Corpus Chapter 663.—nevertheless the Supreme Court of Iowa has inherent and Constitutional jurisdictional authority to issue "all writs" by reason of Article 5, Sec. 4., Iowa.

Plaintiff has made three applications to the Lee County District Court as provided in Chapter 663, all being refused without hearings. The third and final application, case No. 11092, Court Record 33, page 294, August 4, 1949 and supplemental "Court Order" of June 10th, 1965.

This District Court said: "It is apparent that the plaintiff desires the case be re-opened so that he can present

evidence as to whether or not he had a fair trial. The Iowa Supreme Court has already passed upon this question in the plaintiff's appeal from his original sentence." *Therefore denied.*

I shout from the house-tops at my treatment and denial of the only "post Conviction" remedy Iowa provides—in the only District Court available, all others by law—Sec. 663.5, may not issue Habeas Corpus to Fort Madison penitentiary inmates, and this District Court's quoted reasons for refusal are inadequate, unjust, apparently prejudiced, and no grounds for denial of plaintiff's Habeas Corpus petition.

There is but one remaining State Court with jurisdiction to issue Habeas Corpus—the Iowa Supreme Court—therefore this petition. However reluctant this Court may be to entertain this writ, justice requires a post-conviction hearing, an examination of the attached writ and allegations of Federal Due Process violations are so serious, petitioner must be heard!!!

Therefore it is requested the attached Writ of Habeas Corpus be granted by this Supreme Court or a supplemental Court it may choose to set up—other than the Lee County District Court complained of herein, and further that petitioner be given a full, fair, evidentiary hearing so that he establish the necessary facts to sustain this position.

Respectfully submitted,

By GALE JOHNSON.

STATEMENT OF PRIOR HABEAS CORPUS PETITIONS.

That on July 10th, 1948, a Habeas Corpus Petition was filed in this Iowa Supreme Court, it was denied without hearing, see Court Order of July 29, 1948—"petition not verified" and "under 663.5—is not the most convenient Court—.

This petitioner then in view of the above "Order" made three applications to the Lee County Court—all refused without hearings as follows: Case No. 11063, 11085, 11092. The first two cases were refused for failure to meet the form requirements set out in Chapter 663. The last petition #11092 was refused for the reasons set out in the proceding purisdictional statement attached hereto.

This petitioner paid filing fees of $4 each, nevertheless they were never filed, only the "Court Orders" refusing them. Consequently, there are no known copies available.

Petitioner also filed a writ of habeas corpus, Civil No. 1-261 in the Federal District Court, Des Moines, Iowa, which was refused without a hearing or proper consideration. I do not have a true copy of the above filing.

Attention is called to the fact that I have never had a full fair evidentiary hearing, a requirement made in the remanded Farrant case, opinion from the 8th Circuit Court of Appeals.

PETITION FOR WRIT OF HABEAS CORPUS.

Your petitioner is restrained of his liberty by John Bennett, Warden, and is confined in the Iowa State Penitentiary, Fort Madison, Iowa.

Petitioner states he received a jury trial in the District Court of Des Moines County, Burlington, Iowa. That he was unlawfully convicted, and sentenced December 10th,

1934 to Life imprisonment, from which he appealed—see *State* v. *Johnson*, 221 Iowa 8.

That the restraint is illegal in that substantial Federal Constitutional rights, each reversible error as set out in U. S. Supreme Court decisions. In violation of "Due Process" and thereby making null and void the judgment pronounced by Court.

Petitioner states that the entire record plus the community feeling was such that it is evident he did not receive a fair trial, and by reason of the allegations herein.

THE ALLEGATIONS.

1st. District Attorney's comments on accused's silence and failure to testify. Thereby violating the 5th Amendment of the U. S. Constitution, and which is applied to state trials by reason of "Due Process"—14th Amendment.

Griffin v. *State of California* (85 S. Ct. 1229 (1965)).

2nd. That accused was denied an important trial witness in violation of the 6th Amendment and enforced in state trials by reason of "Due Process" set out in the 14th Amendment of the U. S. Constitution. Said denial being accomplished by fraud and trickery, unknown at time of trial.

3rd. Petitioner was denied sufficient "Notice" to prepare and defend himself upon an important trial issue, and the record and new evidence will show a deliberate withholding and concealment from accused of evidence used at trial, for the sole purpose of denying accused time to prepare a defense, in violation of procedural "Due Process" of the 14th Amendment, as required in state trials.

4th. Petitioner alleges a conviction secured by use of perjured testimony, admittedly so, discovery of new evidence unavailable and facts unknown at time of trial. Petitioner expects to prove a tainted trial that will be almost unbelievable, and reversible error as set out in U. S. Supreme Court decisions which are controlling and found to be a violation of "due process" in State Trials.

5th. Petitioner's defense consisted of an alibi, and thus was denied the presumption of innocence, according to accused persons in Iowa trial procedure. That Court was in error in instructing jury on this point of law, however in order to render justice the misconduct of the County Attorney's examination of defendants alibi witnesses,—which went so far that all rules of cross-examination were violated—and then concluded with improper arguments to the jury on alibi matters, resulting in all semblance of a fair trial could not and did not exist. Also the Court's instructions were unreasonable, unfair for they went so far any defense was impossible under the standards Court required of the accused. Petitioner is aware of the recent Iowa Supreme Court opinion in the Stump case, which presently control this matter, it is also true this petitioner's case will present such additional facts as to weigh heavily in an appellant's case.

6th. Petitioner alleges he was denied Federal "Due Process," 14th Amendment in that State's exhibits 1, and 2 were unlawfully entered and placed in evidence without foundation, as required by rules of evidence, and were properly objected to. Plaintiff states these forgeries were allowed by the trial Court as evidence yet not one word was ever spoken by any state witness claiming he obtained exhibits 1 and 2 from accused, or by any transaction in accused's presence or knowledge. (Emphasis supplied.)

7th. *Petitioner Alleges He Is Presently Denied Certain Trial Records in Violation of "Due Process".* And states

the Clerk of Des Moines County Court has refused to accept the necessary fees, and furnish certain trial transcript parts, as required in Sec. 622.46. These consist of State's concluding jury arguments. Petitioner now states that to his knowledge this part of the record contains improper remarks concerning accused's silence and are germane and the transcript record is needed to sustain the *1st allegation herein.* That Court Reporter's "notes", in short-hand exist and can be read. That this petition is a post-conviction remedy and the State must provide all germane records needed to present accused's contentions to appellate Court's, and are Due Process requirements.

NOTICE OF SERVICE: A copy of this petition has been sent to the Attorney General of Iowa, service will also be made upon John Bennett, Warden.

In Conclusion, petitioner contends that a hearing in open Court with the right to subpoena witnesses, documents and records is mandatory upon complaint accused was denied "Due process".

WHEREFORE PETITIONER PRAYS this Court order Respondents show cause why the Writ of Habeas Corpus should not now issue, and render such further judgment as justice requires, and provided for in the Constitution of Iowa, the Supreme Law.

Submitted and subscribed to

GALE JOHNSON per se
Signature of Petitioner.

STATE OF IOWA,
COUNTY OF LEE. } ss.

Gale Johnson, being first sworn under oath, presents that he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

GALE JOHNSON per se.

Subscribed and Sworn to before me in my office this 3 day of January, 1966.

RALPH D. MOEHN,
Notary Public.

My Commission expires July 4, 1966.

IN THE SUPREME COURT OF IOWA.

GALE H. JOHNSON,

Petitioner,

vs.

JOHN BENNETT, Warden, Iowa State Penitentiary, Fort Madison, and State of Iowa,

Respondents.

1-52101

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS.

The petition of Gale H. Johnson for a writ of habeas corpus directed to John E. Bennett, warden of the Iowa State Penitentiary at Fort Madison, filed herein January 4, 1966, is hereby denied on the ground it appears therefrom it is based on claimed illegality of petitioner's conviction more than 31 years ago and that subsequent thereto previous petitions for habeas corpus have been considered and denied by different courts in which the legality of petitioner's imprisonment has been adjudicated. It also appears from the petition that his conviction was affirmed by this court in an opinion in 221 Iowa at page 8.

In support of this order see *Harms* v. *Bennett*, 256 Iowa 1320, 130 N. W. 2d 734, and authorities therein cited.

Done this 6th day of January, 1966.

THE SUPREME COURT OF IOWA,
T. G. GARFIELD,
Chief Justice.

IN THE UNITED STATES DISTRICT COURT
for the Southern District of Iowa,
Eastern Division.

GALE H. JOHNSON, #16614,
Petitioner,
vs.
JOHN BENNETT, Warden, Iowa State Penitentiary
Respondent.

Civil No. 2-403-E

ORDER TO SHOW CAUSE—Filed February 18, 1966

This matter is before the court upon the Petition for Writ of Habeas Corpus, filed on February 16, 1966, and the court having examined said Petition and being duly advised in the premises, it appears that the respondent, John Bennett, Warden, Iowa State Penitentiary, has custody of the Petitioner.

IT IS THEREFORE ORDERED

1. John Bennett, Warden, Iowa State Penitentiary, Fort Madison, Iowa, respondent, is ordered and directed to show cause why a Writ of Habeas Corpus should not be granted, and said respondent shall make return certifying the true cause of the detention of Petitioner within three days after service of this Order upon him.

2. The Clerk of the United States District Court, Southern District of Iowa, shall forthwith serve this Order upon the respondent by certified mail.

Dated: February 18, 1966.

/s/ ROY L. STEPHENSON,
Chief Judge.

IN THE UNITED STATES DISTRICT COURT
for the Southern District of Iowa,
Eastern Division.

Civil No. 2-403-E

[Title Omitted]

RETURN—Filed March 4, 1966.

Comes now, the Respondent and makes return to the Order to Show Cause issued herein as follows:

1. That petitioner Gale Johnson, is presently detained in custody of the respondent under the authority of a sentence of life imprisonment and mittimus issued thereon, entered on December 10, 1934, upon conviction of the offense of second degree murder in the district court of Des Moines County.

2. That the petition for a writ of habeas corpus is insufficient for the reasons set forth in the attached brief in support of this return.

LAWRENCE F. SCALISE,
Attorney General of Iowa.

By /s/ DON R. BENNETT,
Assistant Attorney General,
Attorney for Respondent.

RESPONDENT'S BRIEF IN SUPPORT OF RETURN.

Statement of the Case.[1]

The petitioner is an inmate of the Iowa State Penitentiary at Fort Madison, Iowa, and was committed pursuant to a judgment of the District Court of Iowa in and for Des Moines County entered on or about the 10th day of December, 1934. The judgment was entered on a jury's verdict of guilty of the crime of murder in the second degree and the petitioner was sentenced to imprisonment at hard labor in the Penitentiary at Fort Madison, Iowa, for the period of his life. The petitioner's conviction was affirmed on appeal by the Supreme Court of Iowa. See *State* v. *Johnson,* 221 Iowa 8, 267 N. W. 91.

On or about July 10, 1948, the petitioner filed an application for writ of habeas corpus in the Supreme Court of Iowa. The application was denied because it was not verified as required by Section 663.2, Code of 1946, and because the Supreme Court of Iowa was not the most convenient in point of distance to the petitioner as required by Section 663.5, Code of 1946.

The petitioner filed a petition for writ of Habeas Corpus in the District Court of Iowa in and for Lee County at Fort Madison, Iowa, which was denied on or about August 4, 1949, on the grounds that the questions raised in the petition were decided on appeal from the petitioner's conviction or that such questions should have been presented in such appeal. The record does not show that any appeal was taken to the Supreme Court of Iowa from the denial of this petition.

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1. The assertions of facts made herein are taken from the State's Response to Johnson's petition for certiorari filed in the U. S. Supreme Court on or about February 28, 1962, which petition was denied by the Court on October 8, 1962, 371 U. S. 831.

On or about January 29, 1960, petitioner claimed to have received certain affidavits allegedly executed by one Clarence Nelson Ruggles, who was a witness for the state at the petitioner's murder trial. A copy of these purported affidavits with self-explanatory preface material is appended hereto and labeled exhibit "A". The petitioner claimed that these purported affidavits were proof that Ruggles had falsely testified at the trial and he then made application to the Governor of Iowa for a pardon. The application was denied and the petitioner then filed a petition for direction of remedy with the Supreme Court of Iowa. The petition was denied on May 3, 1960. The petitioner then filed an application to perpetuate the testimony of Mr. Ruggles in the District Court of Iowa in and for Lee County. This application was denied on July 15, 1960, since there was no showing that the petitioner was unable to bring the contemplated action or cause it to be brought.

Petitioner then filed a petition to perpetuate testimony in the United States District Court for the Southern District of Iowa under F. R. C. P. 27(A). On April 21, 1961, the application to perpetuate testimony was sustained and the deposition of Mr. Ruggles was taken in San Bernadino, California, on June 20, 1961. The deposition was filed in the United States District Court for the Southern District of Iowa. The content of the deposition is contrary to the content of the purported affidavit mentioned above. While a copy of the deposition is available to the court, for convenience we are attaching a copy from our files to the original of this return, which copy is labeled Exhibit "B".

On May 19, 1961, after the Order granting the deposition but before the deposition was taken, the petitioner filed a Petition for Writ of Habeas Corpus in this Court claiming that the State of Iowa knowingly used perjured testimony in his criminal trial and that State Habeas corpus proceedings were inadequate and ineffective to protect his rights.

After the deposition of Mr. Ruggles had been taken and filed, the petitioner amended his petition to claim that the testimony of one Thomas Orcussi was illegally suppressed by the state of Iowa thereby denying the petitioner a fair trial.

On July 17, 1961, this Court entered an order denying the petition as amended and on August 30, 1961, the petitioner's application for a certificate of probable cause was denied on the ground that an appeal would be without merit and frivolous. On October 20, 1961, The United States Court of Appeals for the Eighth Circuit also denied the petitioner's application for certificate of probable cause. From the latter Order, a petition for a writ of Certiorari was filed with the U. S. Supreme Court, the same being denied on October 8, 1962, 371 U. S. 831.

Though we are presently unclear as to what action the petitioner has pursued since October 8, 1962, it appears that on January 4, 1966, Johnson filed an original petition for a Writ of Habeas Corpus with the Iowa Supreme Court alleging inter alia, that it was necessary to file the same with that Court since the Lee County District Court refused to entertain such a petition. On January 6, 1966, the Iowa Court entered an order denying the petition.

REASONS FOR DENYING PETITION.

In a habeas action, the petitioner carries the burden and must establish by a preponderance of the evidence that his restraint is unlawful, *Hawk* v. *Olson,* 326 U. S. 271, 279; *Walker* v. *Johnston,* 312 U. S. 275, 287; *Johnson* v. *Zerbst,* 304 U. S. 458, 469. Bare conclusionary allegations, unsupported in the record, fail to meet the burden, *United States* v. *Rozanc,* 210 F. Supp. 900, 901 (W. D. Pa.); *Owsley* v. *Cunningham,* 190 F. Supp. 608, 616 (E. D. Pa.). Moreover, it is well established that habeas corpus is not to serve

the function of an appeal from the criminal judgment. *Fay* v. *Noia,* 372 U. S. 391, has greatly relaxed this last requirement, yet *Fay* v. *Noia,* makes it clear that a Federal District Court need not entertain a habeas corpus action if a petitioner "deliberately by-passed" the state appellate process. We think this rule is also applicable to a situation where an appeal was sought but the petitioner did not raise contentions then known to him but raises them for the first time in habeas corpus. Bearing these general principles in mind, we turn to the instant petition.

The petitioner sets forth six contentions which he alleges establish unlawful restraint. We shall give a brief summary of each one and our answer thereto.

1. It is alleged that present restraint is unlawful in that the petitioner was denied "compulsory process for obtaining witnesses in his favor" in violation of the sixth Amendment, seemingly as made applicable to the states through the Fourteenth Amendment. Specifically, he alleges that the sheriff of Des Moines County, Iowa, refused to serve a subpoena on one Thomas Orcussi and falsely made a return that this witness was not available because he was a mental patient in Clarinda, Iowa.

Though we know of no case holding that the quoted portion of the Sixth Amendment is applicable to the states, we shall assume it is and answer as follows:

(a) The petition on its face (p. 6) shows that this ground was previously presented to this Court in an application for habeas relief, Civil No. 1-261, which application was denied under date of July 17, 1961. In this regard, the legality of the petitioner's contention on this ground has been determined previously and we think that 28 U. S. C. #2244 stands for the proposition that this Court need not again pass on this contention.

(b) The contention regarding the sheriff's fraudulent

conduct is a bare conclusionary allegation. We have found no facts from this petition or from our records in any of Johnson's other actions which in any manner lend support to the allegation. Moreover, the petition is no way indicates what Mr. Orcussi would allegedly have testified to and how the absence of such testimony was prejudicial to him.

2. It is alleged that the petitioner was denied a fair trial in violation of the due process portion of the Fourteenth Amendment, in that a "Notice of Additional Testimony" was served shortly before trial and he was not given sufficient time to prepare a defense to meet the notice of additional testimony.

(a) Again the allegation is a bare conclusionary one; there is no showing even as to the witnesses referred to; and no showing whatsoever that such witnesses gave any testimony or any that was prejudicial to the petitioner.

(b) Though the petitioner in his appeal to the Iowa Supreme Court raised extensive objections to the proceedings against him in Des Moines County, Iowa, we do not find that this objection was tendered to the Iowa Court. In this regard, if the objection was in fact available there is no showing that he did not deliberately by-pass the objection at the time the appeal was taken. Since we have posed a question as to what wasn't raised in connection with the appeal, we think we owe it to the Court to make available "Abstracts and Arguments," Volume 3226, which between pages 506 and 1214 contain all the documents filed in *State* v. *Johnson,* 221 Iowa 8, including the Appellant's (Johnson's) abstract of record, brief and argument and petition for rehearing. Volume 3226 is a permanent part of the Iowa Court's records lodged with the Clerk and its return is, of course, necessary.

(c) It is also of interest to note that this contention was not raised in the prior habeas action filed with this Court,

Civil No. 1-261, though that action arose some 27 years after the conviction now attached.

3. It is alleged that the conviction was secured by the perjured testimony of Drew Orton and Clarence Ruggles, and that Ruggles has since admitted testifying falsely. We shall put aside any question of the need in this action to show that the state used such testimony knowing that it was false.

(a) This ground was presented to this Court in the prior application for habeas corpus, Civil No. 1-261, which was denied on July 17, 1961. See 1 (a) supra and the reference to 28 U. S. C. #2244.

(b) Clarence Ruggle's alleged affidavit (see Exhibit "A") denying the truth of his trial testimony and his subsequent deposition (see Exhibit "B") were before this Court in the prior action. We are, however attaching copies of these documents and request that in accordance with 28 U. S. C. #2248 they be considered as evidence in this action. We think that in comparing the two documents, the manner in which they were obtained, and how they were obtained will leave little doubt as to which is entitled to the greater credibility.

4. It is alleged that the petitioner was denied due process in that certain exhibits were introduced at his trial without proper foundation and contrary to all known rules of evidence. The allegation also refers to these exhibits being forged but the allegation makes it clear that the complaint is based on lack of foundation for introduction into evidence. The contention as to forged documents is a sweeping conclusory one with nothing to support it.

(a) Questions of foundation and local rules regarding the admissibility of evidence do not present a federal question cognizable in a federal habeas corpus proceeding.

(b) We find nothing in the record or argument culmi-

nating in *State* v. *Johnson,* 221 Iowa 8, regarding this contention and yet if the exhibits were a forgery this had to have been known to the petitioner. Moreover, the petition on its face shows that this contention was not presented to this Court in the prior habeas action, even though the contention must have been available at such late date.

5. It is alleged that the petitioner was denied a fair trial and deprived due process in that the "presumption of innocence" accorded the petitioner was destroyed by placing upon him the burden of proving his alibi defense "beyond a reasonable doubt."

(a) We know of no federal case, least of all a U. S. Supreme Court decision, that holds the Iowa rule regarding "Alibi" is subject to attack in a federal habeas corpus proceeding. As we recently argued to this Court in the *Stump* habeas proceeding the Iowa practice as to alibi does not present a federal question.

(b) The petitioner is in error when he states that he had to prove the Alibi "beyond a reasonable doubt." As the Iowa Court pointed out in *State* v. *Johnson,* 221 Iowa at p. 20, Alibi is an affirmative defense and it must be Established by a "preponderance of evidence." The Court also noted that the instruction in *Johnson* did not go as far as it might rightfully have.

6. It is alleged that the petitioner is being denied a transcript of the trial proceedings had in Des Moines County, Iowa.

(a) The obvious answer is that this contention is not and cannot be a reason why the petitioner's present restraint is unlawful, the only question before this Court in a habeas action, nevertheless, we offer the following observation.

(b) The reporter who transcribed the trial is dead and the petitioner has apparently been informed that while the

shorthand notes exist they cannot be deciphered into longhand. In the petition (p. 4) it is not denied that such is the fact but only alleged that he is being denied the trial transcript. Such denial, under the circumstances does not raise a due process problem, cf. *Norvell* v. *Illinois*, 373 U. S. 420, which has some bearing on the issue.

Respectfully submitted,

LAWRENCE F. SCALISE,
Attorney General of Iowa,
By /s/ DON R. BENNETT,
Assistant Attorney General,
State House, Des Moines, Iowa,
Attorney for Respondent.

CERTIFICATION.

It is hereby certified by the undersigned that the cause of detention of the petitioner as set forth in paragraph 1 of the appended return is true and correct.

LAWRENCE F. SCALISE,
Attorney General of Iowa,
By /s/ DON R. BENNETT,
Assistant Attorney General,
State House, Des Moines, Iowa,
Attorney for Respondent.

(Affidavit of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT

For the Southern District of Iowa

Eastern Division

Civil No. 2-403-E [Title omitted]

TRAVERSE TO RESPONDENTS RETURN—

Filed March 16, 1966.

Comes Now, the Petitioner, and answers Respondent's RETURN.

Respondent sets forth in paragraph 1, of the return a statement that petitioner is detained in custody by reason of a Judgment and Mittimus.

1. Petitioner states it is well settled Constitutional law, that if criminal trial proceedings violate Due Process, a subsequent Judgment and Mittimus is *null and void.*

2. That the issues raised herein involve *questions of fact* as well as law.

3. Petitioner has much NEW EVIDENCE to support his Allegations, and meet his burden of proof—as follows:

(A) Mr. Ruggles Affidavits, and Deposition (Respondent filed them).

(B) An affidavit of George Lochrie, which will be found in Clerk's Transcript—Supreme Court Records.

(C) Affidavit of Clell Conyers. } These are on file in
(D) Affidavit of Floyd Lewis. } Governor's office.

(E) Affidavit of Lynn Hosford.

(F) Affidavit of Adelle Turpen.

(G) Certified Letter from Ellen Lush.

Petitioner expects to present important new evidence, oral at his evidentiary hearing.

4. Petitioner has never had an evidentiary hearing, and attention is called to the fact, he made five applications to State Courts.

By GALE JOHNSON, 11614,
Box 316, Fort Madison, Iowa.

(Petitioner brief in support of TRAVERSE omitted in printing.)

AFFIDAVIT.

(Filed by petitioner in support of traverse March 16, 1966 as exhibit C.)

STATE OF IOWA, }
POLK COUNTY. } ss.

I, Thomas John Orsucci, being just duly sworn on oath depose and say: That on November 20th, 1934 I was confined in the Polk County Jail,

That I saw in the *Des Moines Register* a news item saying that I was being subpoenaed to appear as a defense witness in the case of State of Iowa versus Gale Johnson,

That I had knowledge of certain facts pertinent to his defense,

That I immediately informed the turnkey and requested to be taken to the place of trial. I also wrote a note to the judge to the same effect.

That my request was denied and that I was never served with said subpoena.

That I still have said information and can produce it if requested.

THOMAS JOHN ORSUCCI.

Subscribed and sworn to before me this 11th day of February, A. D. 1949.

T. H. HAYNES,
Notary Public in and for Polk County, Iowa.

IN THE UNITED STATES DISTRICT COURT

For the Southern District of Iowa

Eastern Division

Civil No. 2-403-E

[Title Omitted]

ORDER—Filed April 6, 1966.

This matter is now before the Court upon the petition of Gale H. Johnson for a writ of habeas corpus. A return has been filed by the respondent.

In examining this petition, the Court has noted that petitioner contends that he was deprived of an important trial witness, Thomas Orsucci. The petitioner's trial commenced on November 13, 1934, and a verdict was returned on November 24, 1934. The sheriff serving subpoenaes upon witnesses for the petitioner's trial made a return on November 19, 1934, indicating that Thomas Orsucci was being detained in the Clarinda Institution for the insane. The petitioner has filed an affidavit from this individual indicating that on November 20, 1934, he was being detained in the Polk County Jail. Informal inquiries have established that (1) the records at the Clarinda Institution indicate that a man by the name of Thomas Orsucci has never been a patient there and (2) the Polk County Jail records show that Thomas Orsucci was incarcerated in that jail from November 15, 1934 to December 8, 1934. Such facts appear to contradict the return made by the sheriff.

The deliberate suppression of evidence may constitute a denial of due process when it is vital evidence which is

material to the issue of guilt or penalty. *Alcorra* v. *Texas*, 355 U. S. 28 (1957); *Brady* v. *United States*, 373 U. S. 83 (1963). While the facts now before this Court are sufficient to indicate that a due process question may be involved, they are by no means determinative of that issue. It is the view of this Court that the petitioner should be given an opportunity to present additional information as to whether he or his attorneys knew where Thomas Orsucci was at the time of the trial. Additional information is also necessary to determine whether the testimony of Thomas Orsucci would have been material to the petitioner's guilt or punishment.

IT IS ORDERED that the petitioner be and is hereby granted thirty days to file appropriate affidavits or depositions regarding the matter discussed above.

Dated this 6th day of April, 1966.

/s/ ROY L. STEPHENSON,
Chief Judge.

IN THE UNITED STATES DISTRICT COURT

For the Southern District of Iowa

Eastern Division

Civil No. 2-403-E

[Title Omitted]

Re: Civil No. 2-403-E.

AFFIDAVIT—Filed April 20, 1966.

On the sixth day of April, 1966, this Court issued an "Order" in the above entitled case, a habeas corpus action.

Pursuant to this "Order", Petitioner therefore makes his affidavit, as set out below:

AFFIDAVIT OF GALE JOHNSON

STATE OF IOWA, }
COUNTY OF LEE. } ss.

I, Gale H. Johnson, being first duly sworn on oath depose and say:

That your petitioner, Gale Johnson and his trial attorneys had no knowledge as to the whereabouts of Thomas Orsucci, either before trial, during trial, or during the entire appellate process.

That however, your petitioner believed he resided in the city of Des Moines, and Thomas Orcussi was well known to the sheriff and County Attorney of Des Moines County.

That Thomas Orcussi was arrested for the same murder your petitioner was accused of, his arrest took place, I

believe on about the middle of July, 1934. He was brought to this same prison a day or so after his arrest, and held for *many, many* weeks. Thomas Orcussi was however released from custody some time before Petitioners trial.

During petitioner's trial a card, defense exhibit #11, with a statement thereon was served in open Court upon the defense, the statement, "Thomas Orcussi is in the Clarinda Hospital for the Insane". The strategic element (insanity) of the fraudulent statement succeeded in concealing and depriving defense of a competent and valuable witness. For the Courts information, about three years after my trial Thomas Orsucci entered this prison, I talked to him and he told me the true facts of his whereabouts at the time of my trial.

Petitioner just received a letter this 18th day of April, 1966 with the information Thomas Orcussi died early last fall.

Mr. Orcussi's testimony: The state's case consisted of circumstantial evidence, identification was made by two state witnesses, who had previously identified Thomas Orcussi. After further investigation it was shown a mistake was made and Mr. Orcussi was released.

No one can deny the credibility of state witnesses would have been severely damaged, and the fact they had made a previous mistake of identification was extremely important. These facts, were never before the jury and completely unknown. The District Attorney's testimony will also substantiate these facts.

Petitioner takes this opportunity to thank this Court for the opportunity of submitting the facts herein, and states he would be extremely pleased to supply any information, the Court may require, that he is a layman, and his petition left much to be desired.

Respectfully submitted,

/s/ Gale Johnson per se

I, Gale H. Johnson, state the foregoing matters are true and correct to the best of my knowledge.

/s/ GALE JOHNSON.

Subscribed and sworn to this 19 day of April, 1966.

RALPH D. MOEHN,

(Seal) *Notary Public.*

My commission expires July 4, 1966.

UNITED STATES DISTRICT COURT

Southern District of Iowa

Eastern Division

Civil No. 2-403-E

[Title omitted]

ORDER—Filed April 26, 1966

This matter is now before the Court upon the petition of Gale H. Johnson for a writ of habeas corpus. A return has been filed by the respondent.

The petitioner has advanced six contentions in his petition. In essence, three of these contentions were raised by this petitioner in a previous petition which was denied by this Court on July 17, 1961. In the intervening years, however, several Supreme Court decisions, notably *Townsend* v. *Sain*, 372 U. S. 293 (1963) and *Fay* v. *Noia*, 372 U. S. 391 (1963), have significantly affected habeas corpus proceedings. This Court therefore will review all of the contentions raised in the instant petition.

Petitioner first contends that he was deprived of an important trial witness, Thomas Orsucci. The petitioner's

trial commenced on November 13, 1934 and a verdict was returned on November 24, 1934. The sheriff serving subpoenaes upon witnesses for the petitioner's trial made a return on November 19, 1934 indicating that Thomas Orsucci was being detained in the Clarinda Institution for the Insane. The petitioner has filed an affidavit from this individual indicating that on November 20, 1934, he was being detained in the Polk County Jail. Informal inquiries have established that (1) the records at the Clarinda Institution indicate that a man by the name of Thomas Orsucci has never been a patient there and (2) the Polk County Jail records show that Thomas Orsucci was incarcerated in that jail from November 15, 1934 to December 8, 1934. Such facts appear to contradict the return made by the sheriff. As this Court indicated in a previous order, the petitioner's contention relating to Thomas Orsucci presents a due process question. The applicable law governing this problem was enunciated by the Supreme Court of the United States when it held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* v. *Maryland,* 373 U. S. 83, 87 (1963).

The petitioner has filed an affidavit stating that Thomas Orsucci is now deceased, that the whereabouts of this individual was not known by him or his attorneys at the time of his trial and that the testimony of this witness would have been material to his defense.

The crucial question is whether the testimony of Thomas Orsucci was material to a determination of his guilt or punishment. In his affidavit of April 20, 1966, the petitioner makes the following statement:

> "The state's case consisted of circumstantial evidence, identification was made by two state witnesses,

who had previously identified Thomas Orcussi. After further investigation it was shown a mistake was made and Mr. Orcussi was released.

No one can deny the credibility of state witnesses would have been severely damaged, and the fact they had made a previous mistake of identification was extremely important. These facts, were never before the jury and completely unknown. The District Attorney's testimony will also substantiate these facts."

It thus appears that Mr. Orsucci's testimony would have been used in an attempt to impeach the credibility of certain state witnesses. It would not have been related to the substantive elements of the crime itself. Even if the petitioner's statement regarding Orsucci's testimony is accepted as being true, this Court does not feel that it was of sufficient materiality to petitioner's guilt or punishment to declare the suppression thereof a denial of due process.

The petitioner next contends that he was denied due process because not served with a document entitled "Notice of Additional Testimony" until shortly before his trial. This document was apparently served pursuant to Iowa Code § 780.10. This statutory provision requires that if such a document is necessary, it must be served at least four days before the commencement of the trial. The Notice given to the petitioner was dated November 7, 1934. See petitioner's exhibit D. The trial commenced on November 13, 1934. The four day requirement would appear to have been complied with. Even though the petitioner was confined in jail at the time the notice was served, he was represented by counsel. There was no due process violation in connection with this notice.

The petitioner's next two contentions concern perjured testimony at his trial and the introduction of certain exhibits without proper foundation. Both allegations appear to center around the testimony of Charles Ruggles. The

testimony of this witness has previously been questioned before this Court. The petitioner previously introduced statements dated January 29 and 30, 1960 in which Mr. Ruggles indicated that certain testimony he had given at the petitioner's trial was false. After conducting a hearing on an application to perpetuate the testimony of Mr. Ruggles, this Court granted the application on April 20, 1961. The deposition of Mr. Ruggles was then taken in San Bernadino, California on June 20, 1961. In this deposition which was taken in the presence of attorneys representing both the petitioner and the respondent, Mr. Ruggles expressly reaffirmed the testimony he had given at the petitioner's trial and denied the allegations contained in the statements of January 29 and 30, 1960. After again examining the statements and deposition of Mr. Ruggles and considering the conditions under which the same were obtained, this Court finds no basis in this portion of the petition for the granting of a writ of habeas corpus.

Petitioner also alleges that he is being unlawfully deprived of certain trial records. It appears that the reporter who transcribed the petitioner's trial is dead and his shorthand notes cannot be deciphered. It should be noted in this connection that the petitioner was represented by counsel at his trial and on his appeal. A 424 page abstract of the record was prepared in 1935 on behalf of the petitioner. A 125 page brief and a 12 page reply brief were also submitted by petitioner's counsel on the original appeal from his conviction. Under such circumstances, the fact that the petitioner cannot now obtain certain trial records clearly does not deprive him of due process of law. See *Norvell* v. *Illinois*, 373 U. S. 420 (1963); *Christopher* v. *District Court*, 255 Iowa 694, 123 N. W. 2d 892 (1963).

The petitioner's final contention is that due to a jury instruction given by the court at his trial, he was deprived of his right to be presumed innocent until proven guilty

and thus deprived of due process of law. The instruction which is the basis for petitioner's contention is as follows:

> "16. Evidence has been admitted on behalf of the defendant of what is known as an alibi, which means that the defendant at the time that the alleged murder is charged to have been committed, was at another place so that he could not have committed the same. You are instructed that such a defense is proper and legitimate as any other, and you are also instructed that you scan the proof of alibi with care and caution, and all the evidence upon this point both for and against this claim of alibi should be scrutinized with care and carefully considered by the jury.
>
> The burden is upon the defendant to prove this defense by a preponderance of the evidence, that is, by the greater weight or superior evidence. The defense of alibi to be entitled to be considered as established must show that at the very time of the commission of the crime the accused was at another place so far away, or under such circumstances that he could not with ordinary exertion have reached the place where the crime was committed so as to have committed the same. If by a preponderance of the evidence the defendant has so shown, the defense must be considered established and the defendant would be entitled to an acquittal. But if the proof of alibi has failed so to show, you will not consider it established or proved. The evidence upon that point is to be considered by the jury, and if upon the whole case including the evidence of an alibi, there is a reasonable doubt of defendant's guilt, you should acquit him."

This instruction essentially places the burden of proving an alibi by a preponderance of the evidence upon the defendant. The threshold question now before the Court is whether such an instruction is inconsistent with other instructions to the effect that the state must prove all the elements of the crime charged beyond a reasonable doubt and, if it is inconsistent, does such an inconsistency deprive a

defendant of due process of law. It appears to the Court that, to some extent, an inconsistency exists when the "alibi" instruction placing the burden of proof by a preponderance of the evidence upon the defendant is given in conjunction with other instructions which place the burden upon the state to prove the defendant's guilt beyond a reasonable doubt. An attempt to reconcile the varying burdens of proof is made when the jury is instructed that even if an alibi is not established by a preponderance, the evidence introduced for that purpose is sufficient to acquit the defendant if it establishes a reasonable doubt as to his guilt. Although this aids in clarifying the instructions as a whole, they are still somewhat confusing. To be violative of the due process clause of the fourteenth amendment, however, the instruction complained of by the petitioner herein must be such as would constitute a failure "to observe that fundamental fairness essential to the very concept of justice." *Lisenba* v. *California,* 319 U. S. 219, 236 (1941). While the jury instructions in the petitioner's trial contained an evident distinction in the quantum of proof required for establishing an alibi and for proving the guilt of the defendant, it is the view of this Court that the distinction is not of a sufficient magnitude to be violative of the due process clause. See *Leland* v. *Oregon,* 343 U. S. 790 (1952). Although the instruction involved herein may not be a model of clarity, it is not violative of the due process clause of the fourteenth amendment to the Constitution.

It might be worthwhile to note parenthetically that, even if it were determined that the alibi instruction was unconstitutional, there is serious doubt as to whether such a decision should be applied retrospectively. Since there is no need to explore in depth the problem of retroactivity as it applies to the constitutional problem now before the Court, suffice it to comment that under the teachings of *Linkletter* v. *Walker,* 381 U. S. 618 (1965) and *Tehan* v. *United*

States, 34 U. S. L. Week 4095 (January 18, 1965), it is doubtful that a decision holding the alibi instruction involved herein to be unconstitutional should be given retroactive effect.

After carefully reviewing all of the documents which have been presented in connection with the instant petition, this Court concludes that no useful purpose would be served by conducting an evidentiary hearing at this time.

IT IS ORDERED that the petition of Gale H. Johnson, filed February 16, 1966, be and is hereby denied.

Dated this 29th day of March, 1966.

/s/ ROY L. STEPHENSON,
Chief Judge.

(This order bears a filing date of April 26, 1966, and is accordingly referred to as the order of that date by petitioner.)

IN THE UNITED STATES DISTRICT COURT

For the Southern District of Iowa

Eastern Division

Civil No. 2-403E

[Title Omitted]

APPEARANCE—Filed May 6, 1966

Comes Now the law firm of Jesse, Le Tourneau, Johnston & Swanson and at the special instance and request of the petitioner, Gale H. Johnson, hereby enter their appearance as the attorneys of record for the petitioner, Gale H. Johnson, in the above and foregoing entitled cause of action.

JESSE, LE TOURNEAU, JOHNSTON
& SWANSON,

By NORMAN G. JESSE,
1103 Savings and Loan Building,
Des Moines, Iowa 50309,
283-0196,
Attorneys for the Petitioner.

IN THE UNITED STATES DISTRICT COURT

For the Southern District of Iowa

Eastern Division.

Civil No. 2-403-E.

[Title Omitted]

MOTION TO RECONSIDER AND GRANT HEARING—
Filed May 16, 1966.

Comes now the Petitioner, Gale H. Johnson, and moves the Court to reconsider the Order dated the 29th day of March, 1966, and entered of record herein on the 26th day of April, 1966, denying the Petition for a Writ of Habeas Corpus of Gale H. Johnson, and grant the Petitioner an Evidentiary Hearing, and in support of said motion respectfully states that:

1. The thirty days in which to file appropriate affidavits or depositions, granted by the Court's order dated and filed on the 6th day of April, 1966, had not yet expired when the Order denying said Petition was entered of record.

2. Petitioner has never had an evidentiary hearing on the constitutional questions alleged in his petition as is contemplated by Title 28 U. S. C. Section 2243. Petitioner further submits to the Court that while Title 28 U. S. C. Sections 2246-2248, provide a useful tool to the Court in determining whether or not a Petition states a cause upon which relief could be granted, such provisions were not intended to supplant the right to an evidentiary hearing and require a petitioner to try his cause by affidavit. See: *Townsend* v. *Sain,* 372 U. S. 293, 313; 83 S. Ct. 745, 757 (1963); and *Fay* v. *Noia,* 372 U. S. 391, 83 S. Ct. 822 (1963).

3. Counsel first discussed the case with Petitioner at Fort Madison on the 4th day of May, 1966, just two days before the instant Motion was due and twelve days before the extended date for filing the same.

4. Given the number of witnesses and potential witnesses who are still alive and are possessed of knowledge concerning the allegations of said Petition, it cannot fairly be said that a proper and thorough investigation by counsel would disclose nothing to aid the court in its determination of the issues involved herein.

5. The Court's Order, in reliance on *Brady* v. *Maryland*, 373 U. S. 83, 83 S. Ct. 1194, finds that the use of Mr. Orsucci's testimony to impeach the credibility of certain state witnesses would not have been related to the substantive elements of the crime itself, and would, therefore, not be of sufficient materiality to petitioner's guilt or punishment to declare the suppression thereof a denial of due process. Petitioner submits that such an interpretation of that opinion would seem to be an unduly narrow one. In *Napue* v. *Illinois*, 360 U. S. 264, 269; 79 S. Ct. 1173, 1177, the U. S. Supreme Court, admittedly in a somewhat different connection, indicated quite a different view of the value of impeachment evidence in the following terms:

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

It is submitted that it is no less a violation of the concept of ordered liberty to permit the State to suppress impeach-

ment testimony favorable to the defendant in the instant case, that it was in the case last above cited. The Court assumes, as perhaps it must on the present state of the record, that Mr. Orsucci's testimony would have been limited to impeachment of the two eyewitnesses. Who can say what might have been disclosed, had the state not suppressed this testimony. Who can say what a thorough investigation and an evidentiary hearing at this late date would disclose as to the circumstances of Mr. Orsucci's connection with this case.

6. The factual disputes surrounding the testimony of Mr. Ruggles; the proposed testimony of Mr. Orsucci; and the Notice of Additional Testimony would seem to demand that those questions receive a full airing at an evidentiary hearing.

WHEREFORE, Petitioner prays the Court to reconsider the Order entered on the 26th day of April and grant Petitioner a full hearing.

JESSE, LE TOURNEAU, JOHNSTON & SWANSON,

NORMAN G. JESSE,
Attorneys for Petitioner,
1103 Savings & Loan Building,
Des Moines, Iowa,
283-0196.

(Proof of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT

For the Southern District of Iowa

Eastern Division

Civil No. 2-403-E

[Title Omitted]

ORDER—Filed June 17, 1966

This matter is now before the Court upon the motion of the petitioner seeking reconsideration of an order previously entered herein and the granting of an evidentiary hearing. The petitioner's original application for a writ of habeas corpus contained several grounds. It is the view of this Court that all but one of those grounds have been adequately covered in the order entered April 26, 1966. The ground pertaining to the possible suppression of evidence by the State is the only remaining contention which will now be considered by the Court. For the purpose of considering this ground, the Court will conduct an evidentiary hearing.

IT IS ORDERED that upon request of counsel for the petitioner, all proceedings in this matter are transferred from the eastern division of this Court to the Central.

IT IS FURTHER ORDERED that the motion of the petitioner for reconsideration shall come on for an evidentiary hearing before this Court on June 29, 1966, at 9:30 a.m., in the United States Court House at Des Moines, Iowa.

IT IS FURTHER ORDERED that the respondent shall bring petitioner to Des Moines, Iowa, at least one day in advance

of said hearing in order that he be available to his counsel for consultation, and that he be brought before the Court at said hearing.

Dated this 17th day of June, 1966.

/s/ ROY L. STEPHENSON,
Chief Judge.

[Hearing was held July 22, 1966, United States District Court, Southern District of Iowa, and evidence taken. At the conclusion of the proceedings, upon oral motion of petitioner to continue the hearing to present further evidence (habeas corpus record 137), the cause was continued and the hearing concluded August 30, 1966.]

UNITED STATES DISTRICT COURT
Southern District of Iova
Central Division

(Filed August 30, 1966)

Present: Honorable Roy L. Stephenson, Judge.

No. 7-1848-C Civil

[Title Omitted]

CLERK'S COURT MINUTES.

On this 30th day of August, 1966, this case came on for Oral Hearing, on full Evidentiary Hearing and the issues having been duly presented to the Court by Norman G. Jesse, Attorney for the Petitioner, and Don R. Bennett, Attorney for the Respondent, and the Court being fully advised in the premises, IT IS ORDERED AND ADJUDGED as follows:

Evidence for Petitioner proceeded with and concluded at 2:05 P.M. Evidence for Respondent proceeded with and concluded at 2:20 P.M. No Rebuttal. Petitioner requested the Court to File written Briefs. Petitioner granted to Sept. 2, 1966. Respondent has to Sept. 9, 1966 in which to respond.

Filed List of Exhibits attached.

LEON T. MANN,
Deputy Clerk.

Petitioner Witnesses.

1. Gene Tharp, Des Moines, Ia.
2. Gale H. Johnson, Ft. Madison, Ia. Penitentiary.
3. W. C. Moore, Omaha, Nebr.
4. Hal J. Johnson, Des Moines, Ia.
5. John A. Daily, Burlington, Ia.

Respondent Witness.

1. Charles Wilkins, Fort Madison, Ia.

Petitioner Exhibits.

	O	A
1. Affidavit, Jan. 29, 1960	x	x
2. Affidavit, Jan. 30, 1960	x	x
3. Subpoena from Dist. Ct. Nov. 19, 1934	x	x
4. Clerk's Certificate of Death, July 30, 1966		
5. Affidavit, Jan. 22, 1962	x	x
6. Letter, March 16, 1962	x	x
7. Affidavit, Feb. 11, 1949	x	x
8. Affidavit, Nov. 13, 1961	x	x
9. Affidavit, July 15, 1966	x	x
10. Certificate of Death July 21, 1966		
11. Affidavit, July 3, 1959	x	x
12. Certificate of Death Mar. 31, 1965	x	x
13. Certificate of Death Feb. 23, 1962	x	x
14. Original State Court File #4027	x	x
14a. Defendant—Ex. in #4027		
14b. State Ex. in #4027		
15. State's Ex. 3 Photo of Hand Printing	x	x
16. State's Ex. 1 Photo of Hand Printing	x	x
18. State's Ex. 2 Photo of Hand Printing	x	x
19. Deposition of Clarence N. Ruggles	x	x
20. Photo Copy of Newspaper Clipping 7-12-34	x	x
21. Photo Copy of Newspaper Clipping 7-21-34	x	x
22. Photo Copy of Newspaper Clipping 8-21-34	x	x
23. Photo Copy of Newspaper Clipping 8-20-34	x	x
24. Photo Copy of Newspaper Clipping 7-11-34	x	x
25. Photo Copy of Newspaper Clipping 7-11-34	x	x
26. Photo Copy of Newspaper Clipping 7-10-34	x	x

Respondent Exhibits

1. Affidavit Sept. 10, 1934	x	x
2. Group Ex. Handprinting	x	x
3. Abstract & Argument Book (State)	x	x

IN THE UNITED STATES DISTRICT COURT

For the Southern District of Iowa

Eastern Division

[Title Omitted]

RESPONDENT'S BRIEF AND ARGUMENT—
Filed Nov. 10, 1966

(Statement of facts and issues, Division I, and affidavit of service omitted in printing)

* * * * *

II.

Where a petitioner's allegation that perjured testimony was used at his trial by the State, is not supported by evidence showing that the evidence was in fact perjured, or that the prosecutor had knowledge of its falsity, a petition for habeas corpus should not be granted.

AUTHORITIES.

Mooney v. *Holohan,* 294 U. S. 103 (1935).
Alcarta v. *Texas,* 355 U. S. 28 (1957).
Napue v. *Illinois,* 360 U. S. 264 (1959).

ARGUMENT.

Petitioner in this hearing has not substantiated his charge that perjured testimony was introduced at his trial. The testimony from the handwriting experts at the hearing, which establish that petitioner did not write the incriminating "notes" used at his trial, is not sufficient to show that the "notes" were not prepared at petitioner's request. Had the "notes" been given to Mr. Ruggles as he had testified, the obvious interpretation would be that the "notes" were

prepared by someone else at petitioner's request. There is no allegation that the handwriting expert employed by the State at the criminal trial committed perjury, and we must assume that his erroneous opinion concerning the person who had printed the "notes" was an honest mistake.

Thus, the determination of whether or not perjured testimony was given at petitioner's trial rests upon the testimony of Mr. Ruggles. If Ruggles is to be believed, then we must discount perjury and explain the erroneous admissions of evidence as honest mistakes. If, on the other hand, Ruggles did testify falsely, then perjury was committed at trial; and we must then proceed to the question of whether the introduction of the perjured testimony was a violation of petitioner's constitutional rights to due process.

Evidence introduced at this hearing by means of affidavit from Mr. Connyers and Mr. Lewis, who were the two men who Ruggles testified he had received the "notes" from, was to the effect that they had not given the "notes" to Ruggles. L. E. Yates, to whom petitioner made an incriminating oral statement, which Ruggles had overheard, was called as a witness during the trial by the defense and testified that Johnson had not had any conversations with him.

Ruggles, himself, signed an affidavit admitting perjury; however, in a subsequent deposition taken with the leave of this Court, he refuted the affidavit and maintained that his testimony during trial was truthful.

Thus, the question becomes that of determining if Ruggles in fact committed perjury. It is plausible that Ruggles may have seen a possibility of getting some special privileges if he provided testimony to "sew-up" a case for the State against a police officer's murderer. On the other hand, we see the possibility that the prisoners, other than Ruggles, who had been confided in by petitioner, might lie to protect the accused. Ruggles, himself, may have signed the affidavit

admitting perjury, in an attempt to help a man who he had helped convict so many years before.

We respectfully submit that the latter interpretation is most likely, in view of the facts and circumstances of this case. Be that as it may, assuming arguendo that this Court should find factually that the testimony of Ruggles was perjured, we reach the next question—Was the introduction of this perjured testimony sufficient to deprive petitioner of his constitutional rights?

The prosecutor's duty in respect to perjured evidence is not to suborn perjury. *Mooney* v. *Holohan,* 294 U. S. 103 (1935), not to use evidence known to be false *Alcarta* v. *Texas,* 355 U. S. 28 (1957) and to correct State witnesses who lie. *Napue* v. *Illinois,* 360 U. S. 264 (1959). There has been no showing that the prosecuting attorney knew the evidence was perjured or that any agent of the State produced Mr. Ruggles' testimony by offers of parole or leniency, or that the "notes" were prepared or procured by any State agent. At most, the perjury would have been an independent attempt by Ruggles, without any outside influence, to help himself by perjuring evidence.

If that be so, would there be a violation of petitioner's Constitutional rights? We submit that a defendant should not be provided relief by habeas corpus solely upon a showing that a witness testified falsely for the State at his trial. If a remedy for such a grievance exists, it should not reach Constitutional dimensions, but should be left to normal State process.

Another contention which petitioner advances as a separate issue is that he was not given sufficient time to prepare to defend against the testimony of Ruggles and the evidentiary "notes" used at his trial. This question has constitutional validity only if it is believed that the County Attorney was the instigator of the perjured testimony, in

which case the failure to notify accused might be viewed as part of an overall plan to deprive petitioner of his constitutional rights to a fair trial. Since there has been no showing of such instigation by the County Attorney and no showing that the notice violated Iowa State laws, we contend that the issue is not one which raises a Constitutional question.

The final contention raised by petitioner, which we will discuss, is that rules of evidence were violated when the "notes" were allowed into evidence without an establishment of a "chain of custody." Obviously, a chain of custody tracing the evidence back to petitioner was unnecessary because the opinion by the handwriting expert sufficiently establishes the "notes" as having been written by Mr. Johnson. In view of the testimony in this hearing that the "notes" were not printed by petitioner, we concede that the basis for their introduction was incorrect but contend that this matter of evidence should not now be decided as constituting a jurisdictional defect.

Respectfully submitted,

LAWRENCE F. SCALISE,
Attorney General of Iowa.
/s/ TED F. FAY, JR.,
By DAVID ELDERKIN,
Assistant Attorney General.
State House,
Des Moines, Iowa,
Attorneys for Respondent.

(Petitioner's brief and argument filed September 21, 1966, omitted in printing.)

IN THE UNITED STATES DISTRICT COURT

For the Southern District of Iowa,

Central Division.

Civil No. 7-1848-C-1.

[Title Omitted.]

ORDER—Filed December 6, 1966.

This matter is now before the Court upon the petition of Gale H. Johnson for a writ of habeas corpus. The petition was originally filed on February 16, 1966. After receiving a response to an order to show cause and granting petitioner additional time for filing affidavits in support of his claims, the Court entered an order on April 26, 1966 denying the petition. An attorney, Mr. Norman Jesse, then entered an appearance on behalf of the petitioner and requested the Court reconsider its previous order and grant petitioner an evidentiary hearing upon his claims. The Court granted the request and, after petitioner moved for continuance of the hearing from the date it was originally scheduled, an evidentiary hearing was held on July 22, 1966. At the close of the evidence on that day, the hearing was continued and additional testimony was taken on August 30, 1966. Although previous to the hearing the Court limited the issues to be considered, the Court informed petitioner at the hearing that he could make an offer of proof on anything he desired. At the close of the evidence in this matter, counsel for both parties requested permission to file written briefs. The final brief was filed on November 10, 1966.

An indictment was returned on September 25, 1934 by the Grand Jury of Des Moines County charging that on or

about the 27th day of May, 1934, the petitioner herein, Gale H. Johnson, did willfully, unlawfully, feloniously, deliberately, premeditatedly and with malice of forethought kill F. W. Sauer. A plea of not guilty was entered to the indictment. On November 24, 1934, a jury found Gale H. Johnson guilty of second degree murder. The petitioner was sentenced to the penitentiary at Fort Madison, Iowa, for life on December 10, 1934.

The petitioner now contends that he is being unlawfully detained because his conviction was obtained by a denial of due process of law in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, in that:

> "A. He was denied an important trial witness when, pursuant to a Court Order, a subpoena was issued for Thomas Orsucci, and the Sheriff of Polk County failed to serve the same, but falsely informed the Court and defense that, 'Thomas Orsucci is in Clarinda institution for the insane.'
>
> B. He was denied sufficient notice and time to prepare for trial in connection with the matters contained in the Notice of Additional Testimony.
>
> C. His conviction was secured by the use of the perjured testimony of Drew Orton and Clarence Ruggles, and notes forged by them.
>
> D. State's Exhibits One and Two, being the notes above referred to, were admitted into evidence without foundation and contrary to the rules of evidence.
>
> E. He was denied the presumption of innocence by Instruction 16 or the 'alibi instruction.'
>
> F. He was denied his trial records after tendering fees and costs."

Claims E and F have been adequately discussed in the Court's order of April 26, 1966, and will not be reviewed at this time. Evidence relating to the other claims was

presented at the hearing. These claims will be reviewed at this time.

There is circumstantial evidence now before the Court indicating that petitioner Johnson was deprived of the opportunity of calling Thomas Orsucci as a witness on his behalf at his trial.[1] Petitioner contends that the suppression of this witness constituted a denial of due process of law. As indicated in a previous order, the applicable law governing this problem was enunciated by the Supreme Court of the United States when it held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963).

Petitioner Johnson was convicted of the murder of a Burlington police officer. Although there were no witnesses to the actual shooting, two witnesses saw two men—one carrying a shotgun—walking briskly away from the scene of the crime immediately following the shooting. Thomas Orsucci was arrested and charged in connection with the slaying of the police officer. Orsucci was later released and the charges against him dismissed for lack of sufficient evidence. One of the witnesses who observed the two men near the scene indicated that Orsucci resembled one of the men, but was unable to make a positive identification. The other witness stated that Orsucci was not one of the men. However, both witnesses gave positive identifications that Johnson was the man carrying the shotgun. Peti-

1. The return on subpoenas from the sheriff of Polk County stated that "service has been secured upon all * * * except Thomas Orsucci is in Clarinda institution for insane." Thomas Orsucci also was known by the name of Thomas Saunders. The records of the Polk County jail indicate that a man by the name of Thomas Orsucci was incarcerated therein during petitioner's trial.

tioner urges that testimony from Thomas Orsucci concerning his arrest and subsequent release would have tended to impeach the testimony of the two identifying witnesses and the denial of such testimony constituted a violation of due process of law. This Court disagrees. Johnson was positively identified by two witnesses. The failure of these witnesses to identify the other man, even though one witness indicated that Orsucci resembled the second man, does not impeach their positive identification of Johnson. Under the circumstances, the Court cannot now find that Orsucci's testimony was evidence material to the guilt or punishment of Johnson.[2] Petitioner is entitled to no relief on his claim that he was deprived of an important trial witness.

Petitioner's remaining contentions center around the introduction of two notes at his trial and the testimony of Drew Orton and Clarence Ruggles. It is claimed that the notes were forged and the testimony of these witnesses was perjured. It is also urged that Johnson's trial attorney was not informed of the existence of the notes in time for him to prepare a proper defense on this aspect of the case. In connection with this latter contention, the Court has previously observed that the "Notice of Additional Testimony" served upon petitioner shortly before his trial complied with the statutory provisions of the Iowa Code § 780.10. Nevertheless, petitioner contends that his counsel was not given adequate time to prepare a defense to the evidence contained in the Notice—that being the testimony of Ruggles and Orton. Petitioner therefore claims that he was denied effective assistance of counsel. It must be noted that petitioner's able trial counsel visited

2. It should also be noted that the affidavit of Thomas Orsucci stating that he "had knowledge of certain facts pertinent to his (petitioner's) defense" was executed February 11, 1949. No attempt or request was made to take Orsucci's deposition or perpetuate his testimony. Orsucci died in 1965.

the Fort Madison penitentiary one day in advance of trial in an attempt to investigate the evidence contained in the Notice. The investigation appears to have been successful in that the defendant's trial witnesses included L. E. Yates, a convict at the penitentiary. Yates testified that the witnesses Orton and Ruggles were trying to frame Johnson and that the notes introduced into evidence by the State purportedly written by Johnson were fakes. The jury apparently gave little credence to Yates' testimony. In view of the defense evidence attempting to rebut the evidence contained in the Notice, this Court does not accept petitioner's contention that he was deprived of due process of law because he was not given sufficient notice in connection with certain of the prosecution's evidence.

Petitioner's final contention is that his conviction was obtained by the use of perjured testimony and false documents. If such evidence were knowingly used by the prosecution, such use would constitute a denial of due process. *Napue* v. *Illinois,* 360 U. S. 264 (1959). The petitioner has not in this instance established that the prosecution knowingly participated in the use of such evidence. Thus, the dual questions now to be determined are "were perjured testimony or false documents introduced into evidence at petitioner's trial?" And "if such evidence was received, did it result in a trial which was fundamentally unfair?" *Kyle* v. *United States,* 297 F. 2d 507 (2d Cir. 1961). There is undoubtedly conflicting evidence as to whether the witnesses Ruggles and Orton committed perjury and whether the notes were false. This conflict was raised in the trial itself through the testimony of L. E. Yates. Petitioner has filed several affidavits tending to support his contention that perjured testimony and false evidence were used to obtain his conviction. The affidavits of Clarence Ruggles are the ones most strongly supporting petitioner's contention. However, these affidavits have

been expressly repudiated by Ruggles in a deposition taken at the direction of this Court. In addition to the affidavits, petitioner has presented the testimony of a handwriting expert to the effect that the notes introduced at the trial were not written by Johnson and the handwriting expert who testified at the trial, Mr. Faxon, was erroneous in his conclusion that they were. Respondent's handwriting expert concurs in this view. In this connection, it is appropriate to point out that the trial court instructed the jury on this aspect as follows:

Instruction 17:

> Our statute provides that evidence respecting handwriting may be given by experts by comparison, or by comparison by the jury with writing of the same person which are proved to be genuine. Evidence of this character has been introduced upon this trial, and it is proper for the jury to carefully consider the testimony of the witness and to say how much weight shall be given to such testimony, taking into consideration the amount of experience, knowledge and skill possessed by the witness about the matter concerning which his opinion has been given. But, while it is proper to consider such evidence, it is proper to remark that it is the lowest order of evidence, or evidence of the most unsatisfactory character. However upon this question you will compare the writings in dispute with writing of the defendant which you may find proved to be genuine, and in considering this question and doing this you may and should use your own judgment, from comparison of such writing, with the writings in controversy in determining whether or not the defendant actually wrote such alleged writings; and it is your duty and privilege to give your own comparison and knowledge gained from such comparison such weight as you think it entitled to, in connection with the other evidence admitted upon the trial upon this question.

Although petitioner has raised some doubt as to the validity of the notes introduced at his trial, he has failed to establish to the satisfaction of this Court that his conviction was obtained through the use of perjured testimony. Moreover, after reviewing the abstract of record of petitioner's trial, this Court is convinced that the record indicates that petitioner's trial counsel, Mr. Doran and Mr. Finley were able, vigorous and persistent in presenting the case for the defense. Petitioner was afforded a trial consistent with fundamental concepts of justice.

IT IS ORDERED that the petition of Gale H. Johnson for a writ of habeas corpus be and is hereby denied.

Dated this 6th day of December, 1966.

/s/ ROY L. STEPHENSON,
Chief Judge.

IN THE UNITED STATES DISTRICT COURT

For the Southern District of Iowa

Central Division

Civil No. 2-403-E 7-1848-C-1.

[Title Omitted.]

MOTION.

Notice of intention to proceed with Petitioner acting as his own Counsel in the above named Court. Filed December 20, 1966.

Petitioner desires to and will represent himself in further proceedings in the above named Court.

I have talked with Mr. Norman Jesse and informed him

of my decision. I want the record to show this decision was made entirely by petitioner for personal and financial reasons, and in fact I am deeply indebted to Mr. Jesse for his gracious work in my behalf, and as I have informed him I very particularly want to retain his good will. A few days ago I received a nice letter from him indicating his intention to continue helping me.

My case is very old and I can turn to the records wherein facts are set out, which is impossible for anyone else to do, also some of these facts are unrecorded. I would humbly like to state to this Court, time and effort would be saved if in habeas actions petitioner would receive copies of Court Orders from the Clerk of Court as well as his attorney.

Petitioner will make service upon the Respondent and request all legal matters be directed to Gale Johnson.

Respectfully submitted,

/s/ GALE H. JOHNSON,
Gale H. Johnson 16614,
Box 316,
Fort Madison, Iowa.

IN THE UNITED STATES DISTRICT COURT

For the Southern District of Iowa

Central Division

Civil No. 2-403-E

Civil No. 7-1848-C-1

[Title Omitted.]

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE—Filed December 23, 1966.

Petitioner has inserted above, two case numbers, this single action has been dealt with the Court using both numbers.

The above named Petitioner respectfully requests of the Honorable Roy L. Stephenson, Judge, permission to appeal from the Court "Order", dated December 6th, 1966. Therefore, as required by Title 28, Sec. 2253, Petitioner respectfully applies to this Court for a *Certificate of probable cause.*

Petitioner states a "Notice of Appeal will be filed"—in proper time. Also, Petitioner has sufficient funds to pay the costs of the appeal, and will attach to his "Notice of Appeal" the sum of $250 dollars to cover the costs of preparing the record, or as this Court will require.

Petitioner wishes to state he believes a review is necessary and that it should be granted, and hopes this Court will allow his request.

Perhaps this application should contain certain content matter unknown to plaintiff and if so it is hoped the Court will request what is needed.

Petitioner wherefore prays the Court to grant the Application.

Respectfully submitted,

/s/ GALE JOHNSON, *per se*,
Gale Johnson 16614,
Box 316,
Fort Madison, Iowa.

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Iowa
Central Division

Civil No. 7-1848-C-1.

[Title Omitted.]

ORDER—Filed January 4, 1967.

This matter is now before the Court upon the application of petitioner for issuance of a certificate of probable cause under 28 U. S. C. § 2253. In his petition for a writ of habeas corpus, petitioner raised several contentions. Most of the contentions involved factual determinations which do not warrant the issuance of a certificate of probable cause by this Court. However, a certificate of probable cause will be issued in this matter on the basis of petitioner's contention that he was deprived of the presumption of innocence to which he is entitled by the "alibi instruction" which was given at his trial.

IT IS ORDERED that the application of the petitioner, Gale H. Johnson, for the issuance of a certificate of probable cause be and is hereby granted.

Dated this 4th day of January, 1967.

/s/ ROY L. STEPHENSON,
Chief Judge.

IN THE UNITED STATES DISTRICT COURT

For the Southern District of Iowa

Central Division

Civil No. 2-403-E

Civil No. 7-1848-C-1

[Title Omitted]

The Court has used both of the above numbers in dealing with this case.

NOTICE OF APPEAL—Filed January 6, 1967.

From:

U. S. District Court—For the Southern District of Iowa, Central Division, Des Moines, Iowa.

To:

United States Court of Appeals—For the 8th Circuit, St. Louis, Missouri.

Appellant or Petitioner:

Gale H. Johnson 16614, Box 316, Fort Madison, Iowa.

Respondent:

John E. Bennett, Warden, or and the Attorney General of Iowa, State House, Des Moines, Iowa.

Notice:

Petitioner appeals from the above named Court's "Orders" entered herein on the 29th day of April, 1966, and the 6th day of December, 1966.

Respectfully submitted,

/s/ GALE JOHNSON, per se.

Placed in the mail this 3rd day of January, 1967.

STATE OF IOWA, }
COUNTY OF LEE. } ss.

Subscribed and Sworn to on this 3rd day of January, 1967.

WM. F. ABEL,
Notary Public.

(Seal)

My commission expires on the 4th day of July, 1969.

(Petitioner's motion for rehearing filed January 18, 1967, omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Iowa
Central Division

Civil No. 7-1848-C-1
[Title Omitted]

ORDER—Filed January 19, 1967.

This matter is now before the Court upon the application of Gale H. Johnson for an additional evidentiary hearing on his petition for a writ of habeas corpus.

An order denying Johnson's petition was entered by this Court on December 6, 1966. Evidentiary hearings on the petition were conducted on July 22, 1966 and August 30, 1966. At these hearings, the Court attempted to afford petitioner every reasonable opportunity to present evidence in support of his petition. As far as this Court is concerned, petitioner took full advantage of that opportunity. At the close of the evidentiary hearing, petitioner

made no attempt to indicate that he desired to present additional evidence. It was abundantly clear to the Court at that time that petitioner felt he had been granted a full and fair evidentiary hearing. Petitioner was fully aware that if he had additional evidence to present, the Court would have granted any reasonable request to do so. No such request was made. After reviewing petitioner's application for an additional evidentiary hearing, the Court finds that no useful purpose would be served in granting petitioner an additional hearing at this time.

IT IS ORDERED that petitioner's application for an additional evidentiary hearing on his petition for a writ of habeas corpus be and is hereby denied.

Dated this 19th day of January, 1967.

/s/ ROY L. STEPHENSON,
Chief Judge.

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 18,744. September Term, 1967

GALE H. JOHNSON, *Appellant,* vs. JOHN E. BENNETT, Warden, Iowa State Penitentiary,	Appeal from the United States District Court for the Southern District of Iowa.

JUDGMENT.

This cause came on to be heard on the original files of the United States District Court for the Southern District of Iowa; the briefs filed by appellant, pro se, and by counsel for appellant and for appellee, and was argued by counsel for the respective parties.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

November 28, 1967.

Order entered in accordance with Opinion.

ROBERT C. TURNER,
Clerk, U. S. Court of Appeals for the Eighth Circuit.

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 18,744

[Title Omitted]

(November 28, 1967)

Before VAN OOSTERHOUT, MATTHES and MEHAFFY, *Circuit Judges.*

VAN OOSTERHOUT, *Circuit Judge.*

This is an appeal by Gale H. Johnson, hereinafter called defendant, from final order of the district court entered after a full and fair evidentiary hearing denying his petition for a writ of habeas corpus. The record shows that the defendant is presently serving a life sentence in the Iowa penitentiary as a result of his conviction by a jury of second degree murder and the permissible life sentence imposed under Iowa law as a result of such conviction. The conviction was affirmed upon appeal; rehearing was denied. *State* v. *Johnson,* 264 N. W. 596; 267 N. W. 91. The trial court has filed two opinions in this case, one on April 26, 1966, and a final opinion on December 6, 1966. This appeal is from the orders of dismissal based upon such opinions.

The trial court issued a certificate of probable cause under 28 U. S. C. A. § 2253 which concludes, "It is ordered that the application of petitioner Gale H. Johnson for the issuance of certificate of probable cause is hereby granted."

In the discussion preceding the order, the trial court stated that the certificate is being granted on the basis of asserted violation of constitutional rights arising out of the alibi instruction and that other issues involve factual determinations which would not warrant a certificate. Upon the basis of such statements, the State contends that this appeal is limited to the alibi issue. We do not agree. The order portion above quoted contains no restriction upon issues to be considered upon appeal and it is our view that the order granting the certificate does not limit the issues which defendant may raise upon this appeal. While we have considerable doubt whether the trial court can limit issues to be considered upon appeal by limitations in the certificate, we do not reach such issue here.

The jurisdictional issue of exhaustion of state remedies is not raised by either party. The record before us is not as satisfactory on this issue as we would like to have it. It does appear however that defendant has filed three habeas corpus applications in the appropriate state district court and that he has also filed an original habeas corpus application with the Supreme Court of Iowa, presumably raising the issues here asserted. All such petitions were denied without an evidentiary hearing. The Iowa Supreme Court petition was denied on January 6, 1966, by a summary order stating in substance that the legality of petitioner's imprisonment had been determined by the affirmance of his conviction upon direct appeal and by orders denying prior petitions for habeas corpus. So far as we can ascertain, neither the Iowa legislature nor the Iowa Supreme Court has liberalized the rules for consideration of post-conviction attacks asserting federal constitutional rights have been violated in the proceeding resulting in the conviction. As stated by the Supreme Court in *Case* v. *Nebraska*, 381 U. S. 336 (concurring opinions), it is highly desirable that the states solve their own problems by pro-

viding an adequate means of review of post-conviction attacks asserting substantial violation of federal constitutional rights. See *Baines* v. *Swenson,* 8 Cir., 384 F. 2d 621 (Oct. 31, 1967).

Upon the record before us, we believe there has been a sufficient showing of exhaustion of available state remedies and that jurisdiction exists in the trial court to consider the petition and in this court to entertain the appeal. See *Fay* v. *Noia,* 372 U. S. 391; *Townsend* v. *Sain,* 372 U. S. 293.

We now proceed to the consideration of the issues presented by this appeal. Defendant for reversal relies upon the following asserted errors:

I. The use of false evidence against the accused is in conflict with the due process clause of the Fourteenth Amendment and vitiates defendant's conviction.

II. Suppression of the testimony of Orcussi, an important witness, constitutes a denial of due process.

III. The alibi instruction given, which shifts the burden of proof of alibi to defendant, destroys the fundamental presumption of innocence.

IV. The court erred in determining petitioner was afforded a trial consistent with the fundamental concept of justice.

The facts pertinent to this litigation are set out in the opinion of the Supreme Court of Iowa in *State* v. *Johnson,* supra, and in the memorandum opinions of the trial court. We shall limit our factual recital to the bare essentials necessary for the consideration of the issues presented.

It is established beyond question that a police officer was fatally shot about 5:30 a.m. on May 27, 1934 while investigating a burglary at a Burlington store. Defendant at his trial was connected with the murder by two types of

evidence, identification testimony and testimony relating to an alleged admission by defendant. The two witnesses, Chumney and Emerson, who resided near the shooting area, testified they heard the fatal shot and that from their homes they saw two persons, one of whom was the defendant, walking rapidly down the street away from the murder scene and enter and drive away in a black Ford automobile, and that the defendant was carrying a sawed off shot gun. The credibility of their testimony that they were able to identify the defendant, whom they had not previously known, in the short available interval in light of the intervening distance and obstructions, was sharply challenged at the trial.

Defendant did not testify himself but presented eight witnesses who testified that defendant was in Des Moines, one hundred and sixty-four miles distant, at the time of the shooting. If the alibi witnesses' testimony is accepted, defendant could not have committed the crime. We agree with the determination of the Supreme Court made on the appeal that the credibility of the identification witnesses presented a fact issue for the jury.

Defendant was kept at the penitentiary for safekeeping prior to his trial. Two fellow prisoners, Ruggles and Orton, testified at the trial that they heard defendant admit to another prisoner, Yates, that defendant had killed the officer. Yates denied that such statement was ever made to him and there is also evidence that defendant was at all times under close guard and would have been unable to communicate with Yates. Such testimony is referred to in the affirming opinion of the Iowa Supreme Court as testimony supporting the conviction.

At the trial, Ruggles and Orton claimed to have intercepted notes purportedly written by the defendant for smuggling outside the institution.

I.

Defendant, upon the basis of *Miller* v. *Pate*, 386 U. S. 1, and *Mooney* v. *Holohan*, 294 U. S. 103, urges that the use of false evidence against him violates the due process clause of the Fourteenth Amendment. Such statement is too broad. The Court in *Miller* v. *Pate* thus states the applicable rule:

> "More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. *Mooney* v. *Holohan*, 294 U. S. 103. There has been no deviation from that established principle. *Napue* v. *Illinois* 360 U. S. 264; *Pyle* v. *Kansas*, 317 U. S. 213; cf. *Alcorta* v. *Texas*, 355 U. S. 28. There can be no retreat from that principle here." 386 U. S. 1, 7.

In the *Miller* case, the Court found that the prosecutor at the time of trial knew the incriminating shorts were stained with paint and the stains were passed off at the trial as blood stains.

Napue v. *Illinois*, 360 U. S. 264, extends the rule to the situation where the prosecution, although not soliciting false evidence, "allows it to go uncorrected when it appears."

So far as we have been able to ascertain, all the Supreme Court cases setting aside convictions for want of due process by reason of the reception of false testimony are based upon the knowledge of the prosecutor that the testimony received is false or knowledge that material evidence has been suppressed. Such would appear to be a proper limitation of the rule. If convictions could be set aside years after they became final merely upon proof that some testimony of a witness proved to be false, there would be no finality to convictions and the orderly administration of justice would be unduly hampered.

There is no substantial evidence here to support a finding that the prosecutor knowingly used false testimony or that he permitted false testimony received to stand uncorrected. It is the claim of the defendant that certain notes which Orton and Ruggles intercepted were improperly received in evidence upon the basis that they were in defendant's handwriting. There is evidence that such notes were designed for smuggling out of the prison and contained language such as, "Have wife tell same story. Have nothing on me. Do what you said you would for me." and, "They have nothing on any one. All they have to do is just keep still." Mr. Faxon, a recognized handwriting expert from Chicago, testified at the 1934 trial that such notes were in defendant's handwriting. Defendant in the present proceeding produced expert testimony that the writing on the notes was not his, and the State's present expert agrees with such testimony. There is nothing in the record to indicate that Mr. Faxon was not expressing his honest opinion or that the prosecution did not in good faith rely upon his opinion. The difference in the expert handwriting testimony may well be based upon advancements made in the science of handwriting analysis in the years that have intervened since the 1934 trial.

A further claim is made that Ruggles' testimony at the trial is false. Some support is found for this in affidavits provided by Ruggles to an attorney employed by the defendant. Subsequently by court order Ruggles' testimony was taken and the transcript thereof is in evidence. In such deposition, Ruggles repudiates the statements made in the affidavit and the burden of his testimony is that his testimony at the trial was correct.

We agree with the trial court's determination that defendant's conviction is not tainted by the knowing use of perjured testimony by the prosecution or by the suppression by the prosecution of material evidence.

II.

By reason of defendant's poverty, the court directed that certain witnesses, including Thomas Orcussi, be subpoenaed for the defendant at State expense. The sheriff at Burlington assumed responsibility for the service of such subpoenas by sending them to the sheriff of Polk County for service upon the witnesses residing in Des Moines. With respect to Orcussi, the subpoena was returned unserved with the notice, "Thomas Orcussi is in Clarinda Institute for Insane." No further attempt was made to secure Orcussi, apparently in reliance upon such statement, and Orcussi did not appear as a witness at defendant's trial.

In the present proceeding, the Polk County jail records were introduced in evidence and they disclosed that Orcussi was in the Polk County jail serving a thirty-day sentence for intoxication during the period the subpoena was in the hands of the Polk County sheriff for service. The jail records show nothing with respect to the transfer of Orcussi to a mental hospital. The trial court in its opinion observes that his independent investigation discloses that the records at the Clarinda Institution do not show that Orcussi was ever received at such institution. Such evidence establishes a prima facie case that the return of the Polk County sheriff is false. No explanation has been made by the State. Fairness requires an observation that persons who might be in a position to explain the return are no longer available. The record indicates that the prosecuting attorney had no knowledge of the falsity of the return, and defendant as a witness states that he has no evidence to the contrary. On this issue, the trial court states:

> "[T]he applicable law governing this problem was enunciated by the Supreme Court of the United States

> when it held that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' *Brady* v. *Maryland,* 373 U. S. 83, 87 (1963)."

The State does not question the soundness of the law above quoted. An interesting question is raised as to whether "the prosecutor" is chargeable with the suppression of evidence for which the sheriff of another county of the state, apparently having no connection with the prosecutor, is responsible. We need not reach such problem here as we agree with the trial court's determination that no prejudice resulted from the failure to have Orcussi as a witness at the trial.

An affidavit of Orcussi dated February 11, 1949, is in evidence wherein he states that he was in the Polk County jail at the time of defendant's trial and that he was willing to testify as a witness on defendant's behalf and that, "I have knowledge of certain facts pertinent to the defense." Orcussi died in 1965. Orcussi never made any disclosure of what information, if any, he had. Defendant as a witness in the present proceeding stated that he visited with Orcussi while Orcussi was a fellow prisoner in the penitentiary subsequent to the trial; that Orcussi was arrested on the same murder charge as the one upon which defendant was convicted; that Orcussi was held for a time and "that he had been partially identified or had been identified to some extent but I am not certain by what witnesses." The only witnesses at the trial who identified defendant as being near the scene of the crime were Chumney and Emerson. The prosecuting attorney, Mr. Dailey, as a witness in the present proceeding testified that Emerson thought Orcussi looked like the man he saw with the defendant but that he was unable to positively identify him

and that the other identifying witness, Chumney, positively stated that Orcussi was not the man. Orcussi was held for a time for investigation but the proceeding against him was dismissed before defendant's trial for want of evidence sufficient to convict.

Thus it would appear that the only possible use of Orcussi as a witness, as far as the record reveals, would be to attempt to impeach the witness who identified the defendant. Orcussi was never identified by Chumney and was not positively identified by Emerson and hence it is difficult to see where his testimony would have been of any value to the defendant. Defendant's counsel could have obtained this same evidence at the trial by cross-examination of Emerson and Chumney. No significant reference to Orcussi was made during the trial.

We agree with the trial court's conclusion that "the court cannot now find that Orcussi's testimony was evidence material to the guilt or punishment of Johnson. Petitioner is entitled to no relief on his claim that he was deprived of an important trial witness."

III.

Defendant next makes a twofold attack on the alibi instruction given by the court. The first objection is to the language in the instruction directing the jury to look upon the alibi defense with caution. Such attack was considered and rejected upon direct appeal. The attack does not reach constitutional proportions and is not entitled to consideration here.

The second and more serious attack is that the instruction given deprives the defendant of the presumption of innocence in that it improperly places the burden of proof of alibi upon the defendant. The instruction given does place the burden of proof on the defendant to establish his alibi defense by a preponderance of the evidence and

then goes on to say, "The evidence upon this point is to be considered by the jury, and if upon the whole case including the evidence of an alibi, there is a reasonable doubt of defendant's guilt, you should acquit him."

As pointed out by the defendant, this court disapproves a similar instruction in *Glover* v. *United States,* 8 Cir., 147 Fed. 426, upon the basis that the instruction improperly shifts the burden of proof to the defendant. We stated:

> "It loses sight of the fundamental rule in criminal procedure that the defendant is presumed to be innocent of the offense with which he is charged; that this is a continuing presumption which attends him like a guarding spirit throughout the ordeal of his trial, and imposes upon the prosecution the burden of overcoming such presumption by such weight of evidence as will satisfy the minds of the triers beyond a reasonable doubt of the defendant's guilt. This reasonable doubt in his favor applies to the evidence in its entirety and necessarily to any part of it." 147 Fed. 426, 431.

We also determined that an addition, similar to the last sentence of the instruction here given, did not cure the prior portion of the instruction placing the burden upon the defendant to prove alibi and that the incongruous instructions "were well calculated to confuse the understanding of the jury as to how they should apply the rule of reasonable doubt."

The Supreme Court has not passed upon the validity of this type of instruction but the great weight of authority supports the view that such an instruction is erroneous. See *Thomas* v. *United States,* 9 Cir., 213 F.2d 30; Comment, 49 Iowa L. Rev. 590.

We note that the Iowa court has consistently upheld an alibi instruction similar to that given here although the court is sharply divided upon this issue. *State* v. *LaMar,* 151 N. W. 2d 496; *State* v. *Stump,* 119 N. W. 2d 210. The

federal district court, while finding the alibi instruction confusing and not a model of clarity, on the basis of the instructions as a whole determined that the instruction did not result in a fundamental unfairness of sufficient magnitude to be violative of the due process clause, citing *Leland* v. *Oregon,* 343 U. S. 790. It is quite true that in other instructions the court stressed the presumption of innocence, reasonable doubt and the necessity of the State proving all essential elements of the case beyond a reasonable doubt. It is difficult to say on the basis of the instructions as a whole that the defendant was deprived of any substantial constitutional right.

When this case was tried in 1934, the instruction challenged had the full backing of the Iowa Supreme Court. This case was finally adjudicated long before the Supreme Court determined federal constitutional rights guaranteed by the first ten amendments are to be applied to state proceedings by reason of the Fourteenth Amendment. The trial court based its decision in part on cases denying retroactive application to newly determined constitutional principles. We are not squarely confronted with retroactivity here as there has been no authoritative decision by the Supreme Court determining the challenged instruction violates federally guaranteed constitutional rights. However, the reasoning of the Supreme Court cases dealing with retroactivity lends support to the determination that the conviction should not be set aside by reason of the alibi instruction. The cases hold that retroactive application of newly announced constitutional determinations to state prosecutions shall be determined on a case-to-case basis. In a number of situations, retroactive application has been denied. Thus in *Linkletter* v. *Walker,* 381 U. S. 618, the rule of *Mapp* v. *Ohio,* 367 U. S. 643, holding that illegally seized evidence could not be used in a state criminal proceeding, was denied retroactive application.

In *Johnson* v. *New Jersey,* 384 U. S. 719, the Court held that the rules of *Escobedo* v. *Illinois,* 378 U. S. 478, and *Miranda* v. *Arizona,* 384 U. S. 436, with respect to police interrogation without proper warning, should not be applied retroactively. In *Tehan* v. *Shott,* 382 U. S. 406, the Court held that the pronouncement of *Griffin* v. *California,* 380 U. S. 609, proscribing adverse comment on defendant's failure to testify by prosecutors and judges in state criminal trials, is not to be given retroactive effect. There are other cases, such as *Gideon* v. *Wainwright,* 372 U. S. 335 (right to counsel), and *Jackson* v. *Denno,* 378 U. S. 368 (coerced confession), where newly adopted constitutional rules have been given retroactive effect. The tests with respect to retroactivity are fully discussed in the foregoing cases.

No challenge was made to the alibi instruction on constitutional grounds in the defendant's trial resulting in his conviction or in his appeal therefrom. We have little doubt that such challenge, if then made, would have been rejected. We do not believe that the challenge now made, even in the event it is entitled to be upheld under present day standards, would be given retroactive application to the 1934 conviction.

IV.

Lastly, defendant urges that he has not been afforded a fair trial. In addition to the specific complaints heretofore discussed, defendant claims he was prejudiced by the prosecutor's vigorous argument pointing out that he did not take the witness stand to deny the charge; by unfavorable publicity at the time of the trial; and other improper conduct on the part of the prosecution. We are here considering a collateral attack upon a conviction, not a direct appeal. Only errors reaching constitutional dimensions can

be considered and such errors must be fairly raised and established by the defendant.

The errors in this division were not raised by the defendant's petition and were not presented to or considered by the trial court. Issues not properly raised in the trial court cannot be considered upon appeal. The most substantial issue, which relates to comment on defendant's failure to testify, is foreclosed by *Tehan* v. *Shott,* supra.

Defendant was tried before Judge Hale, a fair and able judge who later served with distinction on the Supreme Court of Iowa. Defendant was represented by capable lawyers of his own choosing both at the trial and upon the appeal. All issues raised at his trial and upon appeal received fair consideration upon the basis of the applicable legal standards then existing. Defendant has failed to establish the violation of federal constitutional rights of such magnitude as to entitle him to a new trial.

The judgment is affirmed.

A true copy.
Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit.

DISTRICT COURT OF THE COUNTY OF DES MOINES

The State of Iowa,
Against
Gale Johnson.

INDICTMENT

The Grand Jury of the County of Des Moines, in the name and by the authority of the State of Iowa, accuse Gale Johnson of the crime of Murder committed as follows:

The said Gale Johnson on or about the 27th day of May, in the year of our Lord one thousand nine hundred and thirty-four in the County as aforesaid did wilfully, unlawfully, feloniously, deliberately, premeditatedly and with malice aforethought make an assault with a dangerous and deadly weapon, to-wit; a shotgun, then and there loaded with gun powder and leaden bullets, in and upon the body and person of one F. W. Sauer, a human being then and there being, with which deadly weapon aforesaid said defendant, with the specific and felonious intent and purpose to kill and murder him, the said F. W. Sauer, wilfully, unlawfully, feloniously, deliberately, premeditatedly and with malice aforethought, did shoot off and discharge the contents of said shotgun, being the dangerous and deadly weapon aforesaid, at, against and into the body and person of him, the said F. W. Sauer, thereby then and there wilfully, unlawfully, feloniously, deliberately, premeditatedly and with malice aforethought inflicting upon the body and person of him, the said F. W. Sauer, a mortal wound and injury of which said mortal wound and injury so inflicted by the said defendant, he the said F. W. Sauer did languish, and languishing, did die on or about the 27th day of May, A. D. 1934, in the County of Des Moines and State of Iowa,

And so this Grand Jury does aver, present and say that the defendant in manner and from as aforesaid, did wilfully, unlawfully, feloniously, deliberately, premeditatedly and with malice aforethought, kill and Murder the said F. W. Sauer, a human being then and there being contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State of Iowa.

JOHN A. DAILEY,
County Attorney.

Issue Bench Warrant for the arrest of Defendant, without Bail and remand him to jail of Des Moines County, until legally discharged.

JAMES D. SMYTH,
Judge 20th Judicial District.

This Bill of Indictment was presented in open Court, in the presence of the Grand Jury, by their Foreman, and is now here filed in the presence of the Court, and of the Grand Jury, this 22nd day of September, A. D. 1934.

J. D. JACKSON,
Clerk of the District Court of Des Moines County, Iowa.

The State of Iowa,

Against

Gale Johnson

A True Bill
Arthur McDonald
Foreman of the Grand Jury

Names of Witnesses Examined Before the Grand Jury

H. D. Chumney
Arthur E. Mohnike
Fred Hewitt
Wm. Zike
Geo. Garrett
Gilbert Nelson
Mrs. Faith Hansen
Horace Emerson
Frank Dougherty
Geo. P. Gaul
R. J. Shook
R. E. Goodman
Bill Pappas
Joe E. Baird
John T. Hanna
J. O. Roserons
J. O. Emerick
R. E. Clarkson
Fred Gagen
H. S. Fitzpatrick
Virgil Blakeway
Albert Dickson

Private Prosecutor:

IN THE DISTRICT COURT OF THE STATE OF IOWA

In and for Des Moines County

State of Iowa,
Plaintiff,
vs.
Gale Johnson,
Defendant.

No. 4027

NOTICE OF ADDITIONAL TESTIMONY TO GALE JOHNSON

To Said Defendant:

You are hereby notified that in addition to the witnesses called before the Grand Jury in the above entitled cause of action, the following witnesses will be called to testify in behalf of the State, and the substance of the testimony which they will give is as follows:

O. S. Neal, residing at Fort Madison, Iowa, whose occupation is that of Record Clerk in the Fort Madison Penitentiary will testify that he received from one of the inmates of the Fort Madison penitentiary, two notes, That these notes were purposted to have been written by Gale Johnson who at that time was being kept at Fort Madison Penitentiary as a prisoner.

That he will testify that he turned the said notes and an envelope in which one of the notes was contained, over to John A. Dailey, County Attorney of Des Moines County. That this incident occurred in July 1934.

John A. Dailey, residing at 1311 S. Leebrick St. in the City of Burlington, Iowa, and whose occupation is that of County Attorney of Des Moines County, Iowa, will testify that in the early part of July, 1934, he received from O.

C. Neal Record Clerk of the Fort Madison Penitentiary at Fort Madison, Iowa, two notes and an envelope in which one of the said notes had been contained. That the said notes purported to have come from Gale Johnson.

That he retained the possession and custody of the said notes until Sept. 27, 1934, when they were submitted to Vernon Faxon, Handwriting Expert of Chicago, Illinois for examination.

R. J. Shook, residing at 304 Maple St. in the city of Burlington, Iowa, and whose occupation is that of Deputy Sheriff of Des Moines County, Iowa, will testify that on the 27th day of Sept. 1934, he requested Gale Johnson to do some printing upon a card. That the said Gale Johnson printed the card in his presence and he observed that the said card was printed by Gale Johnson who at that time was an inmate of the Des Moines County Jail.

Clem Wagner, residing at 112 No. Marshall St. in the City of Burlington, Iowa, and whose occupation is that of Bailiff, will testify that on Sept. 27, 1934, he observed Gale Johnson print a card. That the printing upon the said card was done by Gale Johnson in the presence of the said Clem Wagner.

Vernon Faxon, residing at Chicago, Ill. whose office address is 2010 Metropolitan Bldg., at 134 No. LaSalle St. in Chicago, Ill., will testify that he is a handwriting expert, that he has examined the two notes and an envelope submitted by John A. Dailey County Attorney of Des Moines County, Iowa. That he has also examined a paper which purports to have been printed by Gale Johnson in the presence of Clem Wagner and R. J. Shook.

He will testify that the two notes and the envelope submitted by John A. Dailey and the printed document were written and printed by one and the same person.

Drew Orton, who resides at the Fort Madison Penitentiary at Fort Madison, Iowa, will testify that on or about the 4th day of July, 1934, he was present at a conversation between one Yates, an inmate of the Fort Madison Penitentiary, and Gale Johnson, who at that time was an inmate of the Fort Madison Penitentiary, that he heard the said Gale Johnson admit that he had killed a policeman and further state that his reason for doing so was his desire to avoid arrest.

He will further testify that he obtained two notes which were to have been delivered outside the Penitentiary, which were written by Gale Johnson.

Clarence Ruggles who resides at the Penitentiary at Fort Madison and who is an inmate thereof at Fort Madison, Iowa, will testify that on or about the 4th day of July, 1934, he was present with Drew Orton at a conversation between one Yates, an inmate of the Fort Madison Penitentiary and Gale Johnson who at that time was a prisoner at the Fort Madison, Penitentiary, that he heard the said Gale Johnson admit that he had killed a policeman and further state that his reason for doing so was his desire to avoid arrest.

H. E. Brotzer, whose address is R. R. 2, New London, Iowa, and whose occupation is that of a farmer, will testify that on the morning of May 27, 1934, between 6:30 and 7:00 he was out in the front of his house. That he observed a Ford V8 Coupe, dark colored, coming down the road at a high rate of speed. That he noticed it first about eighty rods away and walked out toward the road, and watched it go by. That he couldn't see any license plates on the car in the front or on the back. That there were two men in it. He was about 80 or 90 feet from the car when it went by and that he heard the man sitting with the driver shout to the other: "We've got to angle northwest." The car went by at a high rate of speed.

You will therefore take notice and govern yourself accordingly.

Dated at Burlington, Iowa, this 7th day of November, 1934.

JOHN A. DAILEY,
County Attorney.

STATE OF IOWA,
DES MOINES COUNTY. } ss:

Received the within notice on the 7th day of November, 1934, and I hereby certify that I served the same on the 7th day of November, 1934, on the defendant Gale Johnson, by offering to read the same to him, which reading he waived, and delivering to him personally a true copy thereof in Burlington Township, Des Moines County, Iowa.

HARRY HUNT,
Sheriff Des Moines County, Ia.
By F. J. RENNER,
Deputy.

Filed Nov. 8, 1934.
J. D. Jackson, Clerk, District Court.

Thursday November 15, 1934 7th day

IN THE DISTRICT COURT OF THE STATE OF IOWA

In and for Des Moines County

November Term, 1934

The Court Convened Pursuant to Adjournment

Hon. Oscar Hale Presiding

[Title Omitted]

Now on this day this cause comes on for hearing, the plaintiff the State of Iowa, appearing by John A. Dailey County Attorney, and H. M. Ofelt; and the defendant Gale Johnson appearing in person and by his attorneys L. H. Doran and F. S. Finley; and the issues being joined to try this cause, there comes the following jury:

Frank A. Bawman
Ollie M. Hillgardner
Henry Hillgardner
Jules Wirt
Walter Stigge
E. B. Kettering
Louise Gerdon
Lucretia E. Edwards
Lloyd Sheridan
Chas. H. Brown
Inez M. Martindale
Joe Anderson

who were duly empanelled and sworn at 10:00 o'clock A.M., whereupon the trial proceeded with the opening statements of counsel, and the hearing of evidence until time for adjournment.

IN THE DISTRICT COURT OF THE STATE OF IOWA

In and For Des Moines County

November Term, 1934.

[Title Omitted]

APPLICATION.

Comes now the above named defendant and respectfully stated to the Court:

That he has a good defense to the crime charged in the indictment against him in the above cause.

That in order to properly present his defense it is necessary that the witnesses hereinafter named be subpoenaed from the City of Des Moines, and that he has no money or means with which to pay the witness fees of said witnesses. That all of said witnesses are material witnesses on behalf of the defendant, and that this defendant can not safely go to trial and present his defense herein without the aid of said witnesses, said witnesses being as follows:

May Vance, 1513 Lyon St., Des Moines, Ia.
Bessie Johnson, Burlington, Iowa (Des Moines).
Hal Johnson, 2402 E. Grand Ave., Des Moines, Iowa.
J. E. Johnson, 2402 E. Grand Ave., Des Moines, Iowa.
Howard Rose, 216 E. 16th St., Des Moines, Iowa.
Frank Harty, Des Moines, Iowa.
Clyde Nutt, 616 School St., Des Moines, Iowa.
Thomas Orsucci, Des Moines, Iowa.
Harlan Haws, 318 E. 5th St., Des Moines, Iowa.
Fred Bowers, Bowers Billiard Parlor, Des Moines, Iowa.
Bill Campbell Bowers Billiard Parlor, E. 5th St. Des Moines, Ia.
M. M. Crawford, E. 20th & Grand Ave., Des Moines, Iowa.

James J. Echrosh, 710 Lyon St., Des Moines, Ia.
Nellie Anderson, #216 E. 16th St., Des Moines, Ia.
May Vance, 1516 E. Maple St., Des Moines, Iowa.

That the defendant cannot safely go to trial without the presence of the above witnesses.

That in further support of this application the defendant makes his affidavit hereinafter set out a part hereof.

Respectfully submitted,

GALE JOHNSON,
/s/ DORAN & DORAN,
His Attorneys.

STATE OF IOWA,
DES MOINES COUNTY. } ss.

I, Gale Johnson, being first duly sworn, depose and say that I am the defendant above named; that I have read over the above and foregoing application; am familiar with the facts and statements therein contained; that the witnesses therein named are material witnesses for this defendant; that this defendant has no money or funds with which to pay the witness fees of said witnesses so as to be present at the trial of the above cause; that all of said witnesses are material witnesses necessary for this deponent to present his defendant to the crime charged in the indictment herein; that all of the allegations contained in said application are true as this deponent verily believe.

GALE JOHNSON.

Subscribed and sworn to before me this 16th day of November, 1934.

J. D. JACKSON,
Clerk, District Court.

ORDER.

The above and foregoing Application having been presented in open Court on this 16th day of November, 1934, It Is Hereby Ordered that each and all of the witnesses therein named, shall be subpoenaed by the Sheriff of Des Moines County, Iowa, for and on behalf of the defendant at the expense of said County, and State.

Signed this 16th day of November, 1934.

OSCAR HALE,
Judge.

Filed Nov. 16, 1934
J. D. Jackson, Clerk District Court.

(JURY INSTRUCTION ALIBI.)

16. Evidence has been admitted on behalf of the defendant of what is known as an alibi, which means that the defendant at the time that the alleged murder is charged to have been committed, was at another place so that he could not have committed the same. You are instructed that such a defense is proper and legitimate as any other, and you are also instructed that you scan the proof of alibi with care and caution, and all the evidence upon this point both for and against this claim of alibi should be scrutinized with care and carefully considered by the jury.

The burden is upon the defendant to prove this defense by a preponderance of the evidence, that is, by the greater weight or superior evidence. The defense of alibi to be entitled to be considered as established must show that at the very time of the commission of the crime the accused was at another place so far away, or under such circumstances that he could not with ordinary exertion have

reached the place where the crime was committed so as to have committed the same. If by a preponderance of the evidence the defendant has shown, the defense must be considered established and the defendant would be entitled to an acquittal. But if the proof of alibi has failed so to show, you will not consider it established or proved. The evidence upon that point is to be considered by the jury, and if upon the whole case including the evidence of an alibi there is a reasonable doubt of defendant's guilt, you should acquit him.

(OTHER JURY INSTRUCTIONS)

2. In response to the accusation of the said indictment the defendant has entered a plea of not guilty, and this plea places upon the state, the burden of establishing the material charges of the said indictment, by competent evidence and beyond a reasonable doubt and the innocence of the defendant will be presumed until his guilt, as charged, has thus been established.

3. It is accordingly incumbent upon the prosecution in this case before a conviction of the defendant of the crime charged can be had, murder in the first degree, to establish by the evidence beyond a reasonable doubt that the said defendant in Des Moines County and State of Iowa, on or about the time named in the indictment, did wilfully, unlawfully, deliberately, premeditately and with malice aforethought, and in the manner described in the indictment and by means of the weapon therein named, and with the specific and felonious intent to kill and murder one F. W. Sauer, commit an assault upon the said F. W. Sauer, who may be referred to in these instructions as the deceased, and then and there in the manner and by the means set forth in said indictment, did wilfully, feloniously, deliberately, premeditatedly and of his malice aforethought,

and with the specific intent to kill the said deceased, inflict upon the said deceased a mortal wound which was the direct cause of his death.

If the jury find these alleged facts as charged in the indictment, established by the evidence beyond a reasonable doubt, it will then be your duty to find the defendant guilty of the crime of murder in the first degree. But if you do not find the said alleged facts so established beyond a reasonable doubt, then you must acquit the defendant of said crime, although he may be convicted of a lesser degree of said offense, if the evidence so warrants.

IN THE DISTRICT COURT OF DES MOINES COUNTY, IOWA

November Term, 1934.

[Title Omitted]

VERDICT.

Form One: We, the jury, find the defendant, Gale Johnson Guilty of Murder in the first degree, as charged in the indictment, and we fix the penalty of the crime at death, as by law provided.

.....

Foreman.

Form Two: We, the jury, find the defendant, Gale Johnson, guilty of the crime of murder in the first degree, as charged in the indictment, and we assess the penalty of the crime at life imprisonment, as by law provided.

.....

Foreman.

Form Three: We, the jury, find the defendant, Gale Johnson, guilty of murder in the second degree.

E. B. KETTERING,

Foreman.

Form Four: We, the jury, find the defendant not guilty.

.....

Foreman.

Filed Nov. 24, 1934
J. D. Jackson, Clerk District Court.

IN THE DISTRICT COURT OF THE STATE OF IOWA

In and for Des Moines County.

[Title Omitted]

AMENDMENT TO MOTION FOR NEW TRIAL.

Comes now the defendant and moves the Court to grant to the defendant a new trial and makes this amendment a part of his original motion all without waiving his Motion for Judgment Non Obstante Veridicto and stated that he has newly discovered evidence material to his defense in all as shown by the affidavit of George Lochrie which is hereto attached and made a part hereof that if a new trial be granted the said Geo. Lochrie will appear and testify in substance as shown by said affidavit.

Respectfully submitted,

DORAN & DORAN,
F. S. FINLEY,
Attys. for Defendant.

Dec. 10, 1934.

Filed Dec. 10, 1934
J. D. Jackson, Clerk District Court.

STATE OF IOWA, } ss.
HENRY COUNTY. }

I, George Lochrie, being first duly sworn on oath depose and say that I have been and am now a resident of Mount Pleasant, Henry County, Iowa.

That I was for a time held in the Fort Madison Penitentiary for safe keeping and at the time I was more or less constantly with one Gale Johnson who was tried for murder at Burlington.

That during the time that I was held in the penitentiary at Fort Madison and while Gale Johnson was held there we were occasionally taken to the ball games, and during the time that he and I were there together we were taken to the ball games together and had a separate guard in charge of the two of us.

That at all times when we were in attendance at the ball games, we were separated from any and all other prisoners and were not allowed to communicate with any other prisoner at any time during the progress of the ball games or during the trips that we took from the ball field back to the cells; that I remember the ball game of July 4th, and of several others at or about the same time.

That there was at no time any conversation more than a daily greeting between Gale Johnson and Drew Orton or Yates or Ruggles, or any other prisoner at the drinking fountain or any place else.

That at one time when Gale Johnson and I were being so conducted from the ball game I attempted to go into the fountain when other prisoners were drinking and the guard who was guarding Johnson and myself at that time placed his hand on my shoulder and drew me back until the other prisoners had finished drinking and moved on.

That at no time during the time of our being conducted to and from the ball games was the guard more than five feet away from us and we were at no time permitted to have conversation of any kind with any prisoner or with anyone else.

That there was no time that Johnson could have said anything to any other prisoner that I could not have heard and did not hear, and I know that at no time that I was with Gale Johnson was there any conversation by him with any person about his connection with the murder of Captain Sauers at Burlington.

That at the time that the case was being tried at Burlington I was in the hospital at Iowa City for treatment and at that time it was impossible for me to have been a witness in the trial of the defendant, Gale Johnson.

All of which facts are true as I verily believe.

GEORGE LOCHRIE.

Subscribed in my presence and sworn to before me this 8th day of December, 1934.

F. S. FINLEY,
Notary Public in and for
Henry County, Iowa.

(Seal)

Filed Dec. 10, 1934
J. D. Jackson, Clerk District Court.

Monday December 10, 1934 24th day

IN THE DISTRICT COURT OF THE STATE OF IOWA

in and for Des Moines County

November Term 1934.

The Court Convened Pursuant to adjournment.

Hon. Oscar Hale Presiding:

[Title Omitted]

Now on this day this cause comes on for hearing the plaintiff the State of Iowa, appearing by John A. Dailey County Attorney, and H. M. Ofelt; and the defendant Gale Johnson appearing in person and by his attorneys L. H. Doran and F. S. Finley;

The Motion of the Defendant for Judgment, "Non Obstante Veredicto", the exceptions to the Conduct of the County Attorney, and Exceptions to instructions, and Motion for a new Trial, comes on for hearing, the Court having seen and heard the evidence and listened to the arguments of counsel and being fully advised in the premises,

It is ORDERED, that the Defendant's Motion for Judgment "Non Obstante Veredicto" be and the same is hereby over ruled, To which ruling the Defendant excepts; It is further Ordered that the Exceptions of the Defendant to the Conduct of the County Attorney and also the exceptions of the defendant to the instructions, be and the same is hereby over ruled. To which ruling the Defendant excepts, It is further Ordered that the Motion of the Defendant for a new trial be, and the same is hereby over ruled, To which ruling the Defendant excepts.

Monday December 10, 1934 24th day

IN THE DISTRICT COURT OF THE STATE OF IOWA

in and for Des Moines County

November Term 1934.

The Court Convened Pursuant to Adjournment.

Hon. Oscar Hale Presiding:

[Title Omitted]

Now on this 10th day of December, 1934, it being the 24th day of the November Term of the District Court of Des Moines County, Iowa, and being the day fixed for the Sentence of Gale Johnson, Defendant herein; The said Defendant appearing in person and by his attorneys, F. S. Finley and L. H. Doran, and the State of Iowa, appearing by John A. Dailey County Attorney, and H. M. Ofelt and the Defendant having been convicted of the Crime of Murder in the 2nd Degree, and being informed of the nature of his indictment, his plea, and the verdict of the jury thereon, and being asked if he had any legal cause to show why sentence should not be pronounced against him, and no legal cause being shown, And the Court being fully advised in the premises,

IT IS THEREFORE ORDERED, AND ADJUDGED BY THE COURT, That the defendant Gale Johnson, be sentenced to imprisonment at hard labor in the Penitentiary at Ft. Madison Iowa, for the period of his Life To which ruling the defendant excepts;

It is further Ordered that Bond on appeal be fixed in the sum of Twenty Thousand Dollars ($20,000.00).

IN THE SUPREME COURT OF IOWA

May Term 1935

[Title Omitted]

Abstract of Record—Filed March 22, 1935

[Abstract of record pp. 240-43]

M. M CRAWFORD, called as a witness on the part of the defense, testified as follows:

Direct Examination by Mr. Doran.

My name is M. M. Crawford. I live in Des Moines. I operate two oil service stations there. One at East 20th and Grand, and one at East 17th and Grand. I was working at a D X filling station on the morning of May 27, 1934. That station is about six blocks east of the State Capitol on Grand Avenue. I have known Gale Johnson since a year last August. On that particular morning my hours were from 6:30 in the morning until 2:30 in the afternoon. I went to work at 6:30 The first relief man came on at 7:30 to 8:00. I saw Gale Johnson that morning at the oil station before 7:00 o'clock. He had a Ford Coupe. He bought some gas. He was a customer of the station. He filled it up. I waited on him myself. That was the morning of May 27, 1934. Sunday morning.

Cross-Examination by Mr. Ofelt.

I live at 1911 Des Moines Street. That is in east Des Moines. I guess Gale Johnson lives out in that neighborhood. I don't know his address. I am not related to him. I have leases on these two oil stations, but buy my gas outright. I first met Gale Johnson at the Mid-Continent sta-

tion a year ago last August while I worked there. He was a customer at my station until the time he was arrested He would probably come to the station once a week. The station I am running now has nothing to do with the one I was running on May 27, 1934. I was working then for the Mid-Continent Petroleum. I run two stations now. One is directly across the street from the one I used to work at. On the 27th of May I was just an oil station attendant and I worked from 6:30 in the morning until 2:30 in the afternoon. We work on schedule and the schedule rotates around every four days. We work three days and then on the fourth day the schedule changes. There were four shifts at the station. I would say we do ten thousand gallons a month at the station. I am sure that I saw Gale Johnson on Sunday morning, May 27th, 1934. The reason it was so indelibly impressed on my memory was his arrest shortly following it. My acquaintance with Gale Johnson is only in a business way. I never talked to Gale Johnson after May 27, 1934. The remark was passed at the station among we fellows when the piece came out in the paper telling of his arrest. I made the remark to the fellows that he was in here Sunday morning when that happened. After his arrest his wife came to me and asked if I remembered of his being there and I told her that I had. It was sometime after he was arrested, probably sometime in the month of June. I don't know J. E. Johnson. I think it was Thursday morning that I saw in the paper that Gale Johnson had been arrested. Some fellows by the name of Biggs, Woodmanse and Wilson worked with me. Ed Biggs is still there, I don't know where Woodmanse is and Wilson works with the Mid-Continent. I am sure I didn't wait on anyone that morning before Gale Johnson came to the station.

[Abstracts of record pp. 265-66]

HARLAN HAWS, called as a witness on the part of the defense, testified as follows:

Direct Examination by Mr. Doran.

My name is Harlan Haws. I live in Des Moines, Iowa. I run the B & R. On May 27th, 1934, Mr. Bowers was interested with me. This billiard hall is sometimes referred to as the Bowers billiard hall. There is a confectionery, soda fountain and cigar counter. There is a partition up through the pool hall, and the confectionery end of it is opened seven days a week. I know Gale Johnson, and know his father. I saw both of them that Sunday, May 27, 1934, in the pool hall.

I opened the pool hall right at 7:00 o'clock. Gale's father came into the pool hall first, about five minutes after seven I should judge. Just as I was opening up, Mr. Johnson, Gale's father, drove up. He came in and bought a cigar. A few minutes later Gale Johnson came in.

Q. Describe what happened from there on? A. Well, I guess Gale's dog had bit Mr. Johnson, and when Gale came in, why he told him about it. Mr. Johnson was pretty angry. He told Gale if he didn't get rid of the dog he would kill it. I told them they shouldn't be arguing in there, so after they had argued quite awhile, I told them that they would have to quit arguing in there, so Gale went outside. Pretty soon Gale came back and motioned for his father and he went out. I remembered it because Gale was arrested on Wednesday, and I got to telling them that I didn't think he could have been down there at that time in the morning. I told Mr. Johnson the first time I saw him. That was Wednesday evening or Thursday. I haven't seen Gale Johnson from that time until I saw him in court here.

[Abstract of record pp. 271, 273-75]

L. E. YATES, called as a witness on the part of the defense, testified as follows:

* * * * *

Q. Do you know a fellow by the name of Clarence Ruggles? A. Yes sir.

Q. Do you remember when Gale Johnson came to the institution there this summer for safe keeping? A. Well, I don't remember the time that he come, but I know he was there; I heard about him.

Q. Do you remember of seeing him any time at the institution this summer? A. At a distance, yes sir.

Q. Have you ever talked to Gale Johnson since he has been there this summer? A. No sir.

Q. Have you ever spoken to him? A. I said 'Hello' one time, yes.

Q. Where was he then? A. In the bath room.

Q. Was there a guard with you? A. Yes sir.

Q. Anything happen at the time you spoke to him, said 'Hello'? A. Why, the guard threatened to put me in solitary if I did it any more.

* * * * *

Q. Did you ever see Gale Johnson at the drinking fountain when Drew Orton and Clarence Ruggles were standing there at the fountain, also? A. No. sir.

Q. Did you ever see Gale Johnson at the prison or in the prison yard at any time, except when he was under guard? A. I never did.

Q. Did you ever see him attend a ball game there, under guard? A. Well, if I remember correctly, I have saw them go around after we were all seated, but I don't remember whether it was a ball game or not; if it was, it was at a distance.

Q. Did you ever at any time since Gale Johnson has been there at the institution this summer, state to him at any time or place, "you have got yourself in a hell of a fix."? A. I should say I didn't.

Q. Did you ever state to Gale Johnson since he has been there in the institution at any time: "You have got yourself in an awful mess?" A. I did not.

Q. Did Gale Johnson ever say to you at any time: "Oh not so bad; they haven't got anything on me"? A. He did not.

Q. Did Gale Johnson ever say to you or in your presence or hearing: "If it hadn't been for that little tow-headed cotton-top son of a bitch, I would't be here"? A. He did not.

Q. Have you at any time ever passed any word to Gale on the prison ground or any other place, except to say 'hello' to him in the bath room that day? A. I have not.

* * * * *

[Abstract of record p. 281]

Q. Was there any promise or offer made to you as to what would be done for you, if you would testify as a witness against Gale Johnson? A. No positive promise, no.

Q. Was anything talked about, any money of any kind? A. Well, Mr. Dailey offered me $25.00 to name some of the defense witnesses.

* * * * *

Q. Was anything said to you by anyone, as to what would be done for you if you would get a letter and swear it was Johnson's? A. Why, Orton told me that I would be released.

* * * * *

[Abstract of record pp. 288-89]

Q. Did you ever see the note, Exhibit '2'? A. Yes, I have saw that.

Q. In whose possession was it when you first saw it? A. In Drew Orton's.

Q. Where were you when you saw it? A. Working at my barber chair in cell house "C".

Q. Do you know who prepared exhibit number '2'? A. I didn't see them, but I know who said they done it.

Q. Did Orton tell you who prepared it?

Mr. Dailey: Object to that as improper, calling for hearsay, and no foundation having been laid.

Court: Sustained.

Mr. Doran: Exception.

Q. Did Orton ever tell you that Gale Johnson prepared that note? A. He did not.

* * * * *

[Abstract of record pp. 294, 298-99]

Cross-Examination by J. A. Dailey.

* * * * *

Q. Did you give me the names of some alibi witnesses? A. I never gave you the names of alibi witnesses, if I had, I would have taken that $25.00.

Q. Now, you recall,—state whether or not you recall that I said I didn't know who their alibi witnesses were, but I would like to know in advance of the trial, to you?

Mr. Doran: Object to that as being prejudicial and improper, and no cross-examination, and testimony of the county attorney attempting to get in by indirections something that he can't get in directly.

Court: Overruled.

Mr. Doran: Exception.

I don't remember of you saying any of those words, anything about alibi witnesses.

Q. Just what did I say? A. A good deal of the time you wanted to know, you men wanted to know, if you would offer me $25.00, I was to name three,—

Q. I asked you to give me the names; that is right? A. Will you allow me to answer,—

Court: You can answer,—

A. I am going to answer it in my own-way, like it is,—

Mr. Dailey: Read the question again.

Reporter, reading: "I asked you to give me the names; that is right?"

A. He didn't ask me to give them; he said he would give me $25.00.

Q. I asked you to give me the names,— A. No, you says, I will give you $25.00.—

Q. For what? A. To name three witnesses.

Q. I didn't offer you anything to testify, any money to testify, did I, Mr. Yates? A. Well, I don't know it was to testify, no.

Q. That wouldn't be true, would it? A. I wouldn't think it would be, in that way.

Q. All I wanted to know, or asked you about was the names of the witnesses, isn't that correct? A. Well, I assume that you wanted me to swear to them.

* * * * *

[Abstract of record 353-358]

CLOSING ARGUMENT OF J. A. DAILEY, COUNTY ATTORNEY, FOT THE STATE, AND OBJECTIONS MADE THERETO BY COUNSEL FOR DEFENDANT.

* * * Mr. J. A. Dailey: That I was asked: "Why wasn't Yates brought here?" Before I go into that I want to say that the State would have been glad to have paid Yates $25.00 to get the names of the alibi witnesses. I knew he was a friend of Johnson, from his own statement, the statement that he made, says he was; that he had been acquainted with him for years.

Mr. Doran: Object to counsel testifying, as being improper argument, and entirely outside of the record, and it is improper.

Court: Counsel will remain within the record.

Mr. Dailey: I will state to the jury that that should not be considered by them. He said he knew Johnson for a long time, and that statement was not disputed by the defense.

Mr. Finley went into great detail about Mr. Faxon. Now, I must confess that I am sorry that I am not a handwriting expert. I don't pretend to be one. Mr. Finley has had a great deal to say about that, and I am reminded too, of this horse and buggy-eighty mile an hour comparison, because today I think it is pretty well accepted that finger prints, the testimony of finger print experts is important evidence; and yet fifty years ago my friends, it was regarded with suspicion by our Courts. I also know that the State of New York must have felt that there was something to handwriting evidence, evidence of handwriting experts not only discovered Bruno Hauptmann, but they

held him, and delivered him to the New Jersey Court, and I say the Court in New York must have had some confidence in it.

Some states have a law requiring the defendant to furnish in advance of the trial, to the state, the names and addresses of all alibi witnesses, and what they expect to prove by them. That is a great help. Can you imagine what we might have been able to show if we had known a week before this trial started, that Harlan Haws was going to come down here and say that Gale Johnson was in the pool hall that morning, and that Fred Bowers was going to testify to that, and that Crawford,—No, the first time we knew who was coming down here was Friday night when we got a notice,—when we saw the subpoenas last Friday night, and the first we knew of what their story was going to be was when they went on the witness stand, and they went on, most of them, as I recollect, was Tuesday and Wednesday, and I will ask you whether we had time to go to Des Moines and find out something about their character and their reputation, and whether or not they were telling the truth.

Mr. Doran: Object to this argument which is being made now; that is entirely improper, and it is outside of the record and counsel knows, or, as a lawyer, ought to know, that the defense are never at any time required to furnish the state the names of any witnesses in a particular case, or any evidence on the part of the defense, and this argument as to what the law should be, is outside of the record and it is improper.

Court: I don't know that I got the statement.

(Statement of County attorney, objected to by Mr. Doran, read to Court by Reporter)

Court: The defense is not required to furnish the state

the names and addresses of witnesses at any time. I think the jury are informed of that fact.

Mr. Dailey: That is the law. There is no question about that, and it has been that way as far as I can recall, for fifty years.

Do you remember Mr. Finley said, why isn't that 'D' shown over here? (pointing to handwriting plat) I will be glad to answer that. Do you see this capital 'D' in this space, Mr. Martindale, this capital 'D' (Addressing one of the lady jurors)?

Mr. Doran: Object to the County attorney asking any juror a specific question, as being entirely improper.

Court: I understand that the County Attorney doesn't expect an answer.

Mr. Emerson has lived in this town all his life. They go up to the County jail and get a pal of Johnson to try to shake his testimony.

Mr. Doran: We take exceptions to the remark about going to the county jail to get a pal of Johnson's; that is entirely outside of the record; there isn't any testimony in the record that Berlin was even acquainted with Gale Johnson.

Mr. Dailey: Well, I will withdraw that.

Mr. Doran: We except to the statement being made, and then counsel asking to withdraw it.

Court: I think the County attorney is in order; it is his conclusion or inference.

Mr. Dailey: Well, it was testified to by Mr. Berlin that he did go back and talk to Johnson, but whether or not he was a pal of Mr. Johnson, he had had some conversation with him.

And then there was Frank Daughterty and his wife, and George Gall and his wife. Frank Daughterty runs a confectionery and he testified and George Gall, and they are both honest and reliable citizens of this community; they are not pool-hall hangers on, from Des Moines; they are honest reliable members of this community, and they said that that night over there that three men came in, and one of them carried a sawed-off shotgun and was dressed in a tan leather jacket, and they looked at him for fifteen, for ten or fifteen minutes, and they would never forget his face, along the barrel of a shotgun, and that these men,—

Mr. Doran: I want to make a record on this matter. We except to the remark made by counsel as to the witness Gall and Daughterty as being prejudicial matter, and that matter was withdrawn from the consideration of the jury.

Court: It is not in the record. That part of the testimony was withdrawn by the Court,—

Mr. Dailey: Well, I am sorry.

Court: And the jury should not consider the remark made by the County Attorney, as there is now no evidence before the jury of that kind.

Mr. Dailey: The only evidence of course that the jury can consider on that is, the evidence that Gale Johnson was there and that he had in his possession a sawed-off shotgun, and he was identified as being there on Friday. That is all that you are to consider, and I don't want you to consider anything else about the matter.

It is up to the defense, the burden of proof of alibi, and they have to prove that by a preponderance of the evidence to you. The Court will instruct you that they have to prove the alibi. Are you satisfied that these seven unrelated witnesses, citizens of your community, respected men and women are mistaken? That they are lying, as Mr. Finley says. Are you going to say that they are liars, and

that is what your verdict will say by acquittal. What are you going to say?

You know, you can consider lack of proof too, folks, when you are accused of a crime, and you didn't do it, would you sit quiet while witness after witness pointed you out? If you had been at another place at the time, would you rise to your feet and deny it, and say, I was in Des Moines. Oh, they say that he couldn't, they wouldn't believe him anyway. Well, how do you know? How do we know that they wouldn't believe him? Is there any evidence in this case that he has ever said anything to anybody denying his crime? Are you going to accept the alibi of pool-hall hangers-on and friends of Johnson and his relations, when the man himself has never denied it under oath that he committed this crime? Certainly you are entitled to know what he has to say, and remember that the burden of proof of alibi rests on the defense, and they have to meet that burden.

* * * * *

UNITED STATES DISTRICT COURT

Southern District of Iowa

Central Division

Civil No. 7-1848-C-1

[Title Omitted]

ORAL HEARING ON MOTION FOR RECONSIDERATION OF COURT'S PREVIOUS ORDER, AND ALSO AN EVIDENTIARY HEARING.

Des Moines, Iowa
July 22, 1966
August 30, 1966

Before: Honorable Roy L. Stephenson, Chief Judge, United States District Court, Southern District of Iowa.

Appearances:

Mr. Norman Jesse, Attorney at Law, 917 Savings & Loan Bldg., Des Moines, Iowa, For the Petitioner;

Mr. Don R. Bennett, Asst. Attorney, General State of Iowa, For the Respondent.

[Federal Habeas Corpus transcript pp. 18-20]

* * * * *

Direct Examination by Mr. Jesse.

Q. Would you state your name? A. Gene Tharp.
Q. Where do you live, Mr. Tharp? A. In Des Moines.
Q. And what is your occupation? A. I'm a deputy sheriff.

Q. Do you in your occupation as a deputy sheriff have custody of the records contained in the Polk County Jail? A. Yes, the records and identification files.

Q. Is it your job to maintain the files on prisoners at the Polk County Jail, people who occupy that jail? A. Yes.

Q. Were you served with a subpoena? A. Yes. I was.

Q. And did that subpoena direct you to bring the files with you? A. Yes, it did.

Q. Do you have the files? A. Yes, I have.

Q. Under what name does the file which you brought appear in your index cards? A. Under the name of Thomas Orsucci.

Q. And does any other name appear on those records? A. Yes, it does.

Q. What is that? A. Thomas Saunders.

* * * * *

Q. And do your files indicate that Thomas John Orsucci and Thomas Saunders are one and the same person? A. (Pause). On the returns from the Federal Bureau of Investigation, after our fingerprint cards were submitted under the name of Thomas Saunders, their return shows him also to be Thomas Orsucci—Also as Thomas Orsucci. And this investigation, I presume in Washington D. C., would be made by the fingerprint classification rather than by any other means.

Q. Do your records indicate whether or not Thomas John Orsucci or Thomas Saunders was in jail at any time during 1934? A. Yes, they show he was in jail.

Q. What is the date that he entered the jail? A. Well, here's an arrest October 30th, 1934.

Q. And when was he released? A. November 2nd, 1934.

Mr. Bennett: November what?

The Witness: Second.

Q. (By Mr. Jesse) Is there any other? A. Yes. November 15th of 1934 shows his arrest for intoxication, disturbing the peace. And he left December 8th, 1934.

* * * * *

Cross-Examination.

* * * * *

[Federal Habeas Corpus transcript p. 22]

Q. Does that sheet allege any other arrests of Thomas Orsucci? A. Yes, by other agencies it does.

Q. Would you tell us about those, please? A. It shows him as being fingerprinted by the police department. Also the sheriff's office in Burlington, Iowa.

Q. When was that? I mean, what does your record show? A. July the 10th, 1934.

Q. And he was arrested or fingerprinted by whom? A. Police Department in Burlington, Iowa. Also, the sheriff's office in Burlington, Iowa.

Q. July 10th, 1964—I'm sorry—'34? A. Yes, sir.

Q. For what offense? A. Charge of murder.

* * * * *

[Federal Habeas Corpus transcript pp. 104-113]

WINSOR C. MOORE, called as a witness in behalf of the petitioner, being first duly sworn by the clerk, testified under oath as follows:

Direct Examination by Mr. Jesse.

Q. Would you state your name, please? A. Winsor C. Moore?

Q. Where do you live, Mr. Moore? A. Omaha, Nebraska.

Q. What is your business or profession? A. Pro-

fessor of Law, Creighton University School of Law, Omaha, Nebraska.

Q. How long have you been a law professor? A. Since 1946.

Q. Do you pursue any other kind of business or profession? A. Yes, sir. I am an examiner of questioned documents.

Q. How much time do you devote to this portion of your work? A. At the present time, I am devoting between twenty and thirty hours per week.

Q. How long have you studied the subject of questioned documents? A. Approximately twelve years.

Q. In general terms, what is the work of a questioned document examiner? A. In general, the work of a questioned document examiner has to do with the identification of handwriting, hand printing, typewriters, typewriting, obliterations, delineations, determining the age of inks and constituents of papers and like matters.

Q. How many different cases do you think you would examine in a year's time? A. At the present time, I examine between 150 and 200 cases per year.

Q. And have you testified as an expert witness in cases before this? A. Yes, sir.

Q. How often do you testify? A. At the present time, I average about 30 to 40 trial appearances per year.

Q. Do you belong to any national organizations or societies which are concerned with questioned documents? A. I am a regular member of the American Society of Questioned Document Examiners and I'm also a member of the American Academy of Forensic Sciences, the questioned document section. These are the two outstanding organizations of their kind in the United States.

Q. What is the purpose or scope of these organizations, and how do you become a member of them? A. In order to become a member of either of these organizations you

have to be invited to join after the organization has observed your qualifications for several years. At the present time there are twenty-one members in the American Society of Questioned Document Examiners, and the primary purpose of the society is that by an annual conference each year of one week the examiners meet and study together the latest techniques in document examination.

Q. Have you done any lecturing on the subject of document examination? A. I have lectured at several bar association meetings and at various institutes throughout the country on document examination.

Q. Could you give us a general theory of disjoined hand printing or hand lettering? A. The underlying theory of identification of hand printing or hand lettering is that in examining two specimens, for example, in order to make a positive identification, we must not only have a matching of sufficient printing characteristics in the two samples but in addition we must be able to reconcile all the differences between the two specimens.

Mr. Jesse: Do you have any questions regarding his qualifications, Mr. Bennett?

Mr. Bennett: No.

Q. (By Mr. Jesse) Mr. Moore, I'm going to hand you what the court reporter has marked Plaintiff's Exhibit 15 and ask you to state what that is, if you will. A. Plaintiff's Exhibit 15 is a reproduction of a form of the Bureau of Investigation, Washington, D. C.

Q. Have you ever seen that before? A. I have seen a reproduction of this form. I cannot say positively that it was this one.

Q. You have seen this or one just like this? A. Yes, sir.

Q. I hand you what the court reporter has marked Plaintiff's Exhibit 16 and ask you if you have ever seen that one? A. I have seen a like reproduction of the matter appearing on Plaintiff's Exhibit 16.

Q. I hand you what the Court reporter has marked Plaintiff's Exhibit 18 and ask you if you have ever seen that before? A. I have seen the material appearing on Plaintiff's Exhibit 18 in a like reproduction.

Q. Could you tell the Court when you saw those exhibits and under what circumstances you saw them? A. I saw a reproduction of these three exhibits during June of 1959, for the first time, when these reproductions were submitted to me by Mr. Everett Gross, Decorah, Iowa.

The Court: What was that date, professor?

The Witness: Middle of June, 1959.

Q. (By Mr. Jesse) And did you examine those exhibits at that time? A. Yes, sir.

Q. What did you do in making this examination? A. I made a comparison of the printing appearing on the three reproductions with a view to determine whether or not the same person was the author of the hand printing appearing on all three exhibits.

Q. Were you given any instructions relative to what findings or results were desired? A. No, sir. I was to make an impartial examination.

Q. And have you now made that examination? A. Yes, sir.

Q. As a result of that examination have you formed an opinion relative to the author of these three documents? A. Yes, sir, I have an opinion.

Q. What is that opinion? A. My opinion is that the person who printed the matter appearing on Plaintiff's Exhibit 15 was not the author of the printed matter appearing on Plaintiff's Exhibit 16 or Plaintiff's Exhibit 18.

Q. Were any of those three documents printed by the same person? A. In my opinion, each of the exhibits 15, 16 and 18 were printed by separate individuals.

Q. Would you state for the Court the reasons for your opinion that you have first stated? A. Yes, sir.

• • • • •

The Witness: In giving my reasons for the opinion stated, I shall refer to Plaintiff's Exhibits 15 and 16 and 18. Referring first to Plaintiff's Exhibit 18, it can be observed from the hand printing appearing on this exhibit that the writer in printing the letter "a" printed an "a" with a broad top rather than a pointed top. And this broad top appears consistently throughout all of Plaintiff's Exhibit 18. In comparing this style of a broad top "a" appearing on Plaintiff's Exhibit 18 with the type of "a" appearing on Plaintiff's Exhibit 15, which is a Bureau of Investigation form, and purportedly printed by Gale Johnson, I find that in none of the hand printing on Plaintiff's Exhibit 15—find none of it that has square tops. In fact, in my opinion, here all the "a's" have pointed tops. So, on the basis of the "a," I think it can be said, in my opinion at least, that the person who wrote Plaintiff's Exhibit 18 with the square top "a's" is not the same person who wrote the matter appearing on Plaintiff's Exhibit 15 with the pointed top "a".

With regard in Plaintiff's Exhibit 16, looking at the "a" appearing on this particular exhibit, the cross bar of the "a" protrudes beyond the down stroke of the right-hand portion of the "a". In other words, the cross bar extends to the right. And this is seen repeatedly whenever the "a" has been written on Plaintiff's Exhibit 16. Certainly, this appears well defined in the word "Gale" at the bottom of Plaintiff's Exhibit 16. This same characteristic of extending the cross bar of the "a" is also evident in the printing of the "h" in the word "have". The cross bar of the "h" extends to the right the same as the cross bar of the letter "a". This protrusion to the right of the letters "a" and "h" on Exhibit 16 cannot be found in any of the "a's" or "h's" appearing on Plaintiff's Exhibit 15. So it can be said, I believe, that the type of "a" that we have on Plaintiff's Exhibit 18 and the

type of "a" appearing on Plaintiff's Exhibit 16, and the type of "a" appearing on Plaintiff's Exhibit 15 are different types of a's.

Next, referring to Plaintiff's Exhibit 15, the Bureau of Investigation form, we can look at the letter "t" in the word "white" where the top of the printed "t" has two downward serifs. And this same type of a "t" appears also on Plaintiff's Exhibit 15 in the word "Charlton" and also in the abbreviation for "street" where we have these downward serifs at the top of the letter. I do not find any similarity of the serifs appearing on the "t's" in the printing on Plaintiff's Exhibit 16 or 18.

With regard to Plaintiff's Exhibit 15, we can look at the letter "y", for example, in the "yes" written twice on this Bureau of Investigation reproduction, and in comparing that type of a "y" in "yes" written twice on the Bureau of Investigation reproduction, Plaintiffs Exhibit 15, and comparing it with the "y" appearing twice on Plaintiff's Exhibit 16, I think the downward stroke of the tail of the "y" is reversed. In other words, on Plaintiff's Exhibit 15, the Bureau of Investigation form, the tail of the "y" swings off to the left, whereas, in Plaintiff's Exhibit 16, where we have the "y" in "story" and also in "you," the tail of the "y" swings off to the right, which is diametrically opposed to the style seen in Plaintiff's Exhibit 15.

We might look at the letter "l" next in Plaintiff's Exhibit 15, the first line, where we have "Gale," where we have this "l" with the upward serif at the end, and in none of the other exhibits, Plaintiff's Exhibit 16 or 18, do we find a similar type of an "l." Actually, if we look at Plaintiff's Exhibit 18, at the top of that exhibit we have the word "tell." And I'm looking at the base of the two "l's" there. There's a curve at the base line, and this curve effect is seen repeatedly throughout the material

printed on Plaintiff's Exhibit 18. All these "l's" curve at the bottom slightly upward. This curving of the "l" is not seen in Plaintiff's Exhibit 16 nor is this curving of the "l" seen in Plaintiff's Exhibit 15, the reproduction of the Bureau of Investigation form.

Briefly, those are my reasons for stating that in my opinion, the person who printed the material appearing on Plaintiff's Exhibit 15, the Bureau of Investigation form, was not the author of the printing appearing on Plaintiff's Exhibit 16 or the material on Plaintiff's Exhibit 18.

• • • • •

[Federal Habeas Corpus Transcript 119-122]

Recross Examination by Mr. Bennett.

Q. Do you have an opinion on whether or not it is possible that Plaintiff's Exhibits 16 and 18 could have been written by the same person? A. Looking at the printing on Exhibits 18, it appears that this printing here was done very fluently and very slowly and deliberately, along a straight baseline of writing; whereas, the printing appearing on Plaintiff's Exhibit 16 is rather irregular. The letters here—some are high and some are low, and they do not form the regularity that we see depicted from the printing on Plaintiff's Exhibit 18. Now, when you say is it possible, it might be possible as a remote possibility and remote probability. If a person actually took considerable deliberation and means to do this and practiced it for some time before doing so, there is always a remote possibility or a remote probability, but it, in my opinion, would be exceedingly unlikely.

Q. Would your answer be the same if I asked you is it possible if the writer of Plaintiff's Exhibit 15 might have been the writer of either one or both of these other exhibits? A. I think it's always possible, but remotely improbable.

And the mathematical odds would make it rather a degree of certainty that the person who printed the material on Plaintiff's Exhibit 15 did not print the material appearing on Plaintiff's Exhibits 16 or 18.

Q. If Plaintiff's Exhibit 15 was—if the printing there was done subsequent to the printing on Plaintiff's Exhibits 16 and 18, and if one made a studied effort to change his printing, could this account—assuming along with me—could this account for the discrepancy if we assume that there is a possibility? I guess I probably didn't put that very well. Let me ask it again. Assuming that Plaintiff's Exhibit 15 was printed subsequent to the other two exhibits. If one made a studied effort, could he change his printing sufficiently enough to come up with this as opposed to the printing on either one of the other two exhibits? A. I suppose you could say it's possible, but extremely unlikely because there are so many printed letters here on Plaintiff's Exhibit 15 that it would be a remote possibility that the person could print all these letters appearing on Plaintiff's Exhibit 15 and not reveal any of the printing characteristics of what he was trying to copy.

Mr. Bennett: Thank you, Professor.

Redirect Examination by Mr. Jesse.

Q. Professor Moore, could you give us some idea of what some of the common mistakes are when someone attempts to disguise his handwriting, and tell us whether or not that is easy to determine? A. What will we look for where there is disguise?

Q. Yes. A. If a person attempts to disguise handwriting, there are two common characteristics that will be prevalent in a disguise. One is that the person will alter the style of the capital letters and will vary the slant of the writing. These are the two characteristics of a

person attempting to disguise either hand printing or handwriting.

Q. Do you see any of those characteristics in Plaintiff's Exhibit 15? A. No, sir.

Mr. Jesse: That's all.

Mr. Bennett: No further questions.

(Witness excused.)

PETITIONER'S EXHIBIT 3.

Cancellation stamp contains:
Des Moines, Iowa
Nov. 19, 1934
7 P. M.

[Imprinted postal stamp omitted in printing]

|this side of card is for address|

Harry W. Hunt, sheriff
Burlington
Iowa

20-42970

State of Iowa
vs.
Dale Johnson et al.

Office of
Sheriff of Polk County
Des Moines. Iowa

..... 19.....

Dear Sir: Service has been secured upon all parties—except—

Thomas Orsucci is in Clarinda institution for Insane

Sheriff's Fees $..... Advanced. Notice returned to Clerk Sheriff's Fees $3.65 Unpaid. Return will be made to you upon receipt of same.

C. F. Keeling, Sheriff by E. C. Koons, Deputy

PETITIONER'S EXHIBIT 16.

HAVE . WIFE . TELL . SAME . STORY . HAVE . NOTHING . ON . ME . DO . WHAT . YOU . SAID . YOU . WOULD . FOR. ME .

GALE

States Exhibit No. ONE J. M. M.

PETITIONER'S EXHIBIT 18.

TELL. D. K. TO LAY LOW AND HE WILL BE ALRIGHT. TELL HIM TO TELL THE . WIFE . TO GO AHEAD AS HER AND DAD PLANNED TO DO. THEY HAVE NOTHING ON ANYONE ALL THEY HAVE TO DO IS JUST KEEP STILL AND EVERYTHING WILL BE. OK. TELL WIFE TO SEE A. C. SHE WILL KNOW WHO AND WHAT I MEAN. WHEN YOU GO TO DES MOINES. BE CAREFUL KEEP . AWAY . FROM . D. WILL TRY . AND GET SOME WORD . OUT NEXT . WEEK . DONT WORRY . . I . AM . TELLING THEM NOTHING THANKS AND GOOD LUCK.

G

States Exhibit No. TWO J. M. M.

PETITIONER'S EXHIBIT 15.

BUREAU OF INVESTIGATION

Department of Justice

Washington, D. C.

STATISTICAL

PRINT—DO NOT WRITE

No. ..... Name Gale Johnson Alias .....
P. O. Address ..... County Polk
Date of Birth 1905-Feb. 23 Place Chariton, Ia.
Color White Height 5 feet 8 inches; Weight 160 lbs.
Color of Eyes Brown Hair Brown .....
Is Father Living? Yes Name J. E. Johnson
P. O. Address 1620 E. Vine St., Des Moines, Ia.
Is Mother Living Yes Name Mrs. Vance
P. O. Address Des Moines, Ia.
Nativity of Father American of Mother American
Special History or Remarks:

States Exhibit No. THREE J. M. M.

RESPONDENT'S EXHIBIT 2.

BUREAU OF INVESTIGATION
Department of Public Safety
State Office Building
Des Moines, Iowa

Date: August 2, 1966
Approved:
Lawrence Scalise
Attorney General
State of Iowa

Please Refer
To File
66789

To: Local

From: R. D. Blair, Director

Atten: Don Bennett

Subject: Gale Johnson—Writing

The following items were brought to this Bureau by Mr. Bennett for examination:

Q1—One photographic enlargement of a handprinted note, signed with the letter "G".

Q2—One photographic enlargement of a handprinted note, signed "GALE".

K1—One photographic enlargement of a handprinted specimen, purporting to be that of one Gale Johnson.

Examination has been made of the above described material as requested, and we have compared the known specimen of printing with the two items in questions. It has been concluded and is the opinion of this Examiner that Gale Johnson, whose known printing appears on Specimen

K1, is not responsible for the printing on Specimen's Q1 and Q2.

* * * * *

R. D. BLAIR,
Director,
Iowa Bureau of Criminal Investigation,

By /s/ DUANE L. BARTON,
Assistant Director,
Questioned Document Examiner.

PETITIONER'S EXHIBIT 24.

The Daily Hawkeye Gazette, Burlington, Iowa, July 11, 1934: ~~1068.~~

HOLD JOHNSON'S WIFE FOR INQUIRY

ORSUCCI HERE,
DENIES GUILT
IN SAUER CASE

Police Checking Up On Story
He Tells of Whereabouts
May 27 Last

Mrs. Dessie Johnson, 29, wife of Gale Johnson, who is held without bond on a charge of first degree murder for the alleged shotgun slaying of F. W. Sauer, police captain, on May 27 last was ordered held for investigation this morning by County Attorney J. A. Dailey, Jr., and is scheduled to have a hearing in police court on next Monday.

Mrs. Johnson, who came here this morning with Johnson's father and Chas. P. Howard, colored attorney of Des Moines, refused to make any statement on the turn of events which placed her in custody and while no official announcement was made as to the entire basis for charges against her, it was reported that she had been identified as the companion of Dale Johnson and Thomas Orsucci in a beer tavern and dance hall a few miles east of Burlington on the night preceding the killing.

Accomplice Suspect Held.

Mrs. Johnson arrived in Burlington just a few hours after Thomas Orsucci, 29, alias Tom Saunders, of Des

Moines, was brought here for questioning. Arrested yesterday at the request of Burlington officers on suspicion that he was Johnson's accomplice in the killing and the cracking of two safes here, Orsucci was brought back late last night and lodged in the county jail over night. When questioned this morning he denied any part in the crime here and declared that he had not been out of Des Moines for the last two years.

New Identification.

Viewed by several people who had identified his photograph, authorities announced that he had again been

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(Continued on Page Two.)

Two

MRS. JOHNSON
HELD FOR QUIZ

Orsucci, Second Suspect, Returned Here, Denies Any Guilt

---

* (Continued from Page One.) *

identified today as being in a beer tavern with Johnson and Johnson's wife the previous night, and he was said to have been identified by one witness who saw the two men walk away, under police fire, a moment after the slaying of the Burlington officer. He is to be viewed later by several men who were victims of a hold-up at Galesburg, Ill., the previous day.

* * * * *

PETITIONER'S EXHIBIT 20.

The Daily Hawkeye Gazette, Burlington, Iowa, July 12, 1934: ~~1968.~~

ORSUCCI IS
CHARGED WITH
SAUER MURDER

Waives to Grand Jury and Is
Held Without Bond—Sticks
To Denial

Thomas Orsucci of Des Moines, Ia., arrested as a suspect companion of Gale Johnson who is held for murder in connection with the shotgun slaying of Police Captain F. W. Sauer May 27, himself was charged with first degree murder this morning and when arraigned in police court this morning, waived preliminary hearing; and was held to the September term grand jury, without bond.

Has Twin Daughters.

Orsucci, who denied any connection with the crime during an exhaustive period of questioning yesterday, was silent in police court this morning and was represented by Attorney Frank Dapolini of Des Moines. Orsucci's brother-in-law, John Manos of Des Moines, also came to Burlington this morning and was in police court. Orsucci, separated from his wife, is the father of twin daughters, aged 9 years, who are in custody of their mother.

Orsucci is to be questioned later in the day by County Attorney J. A. Dailey, Sheriff Harry Hunt, Deputy Shook, Police Captain Joe Baird, and Harvey C. Jaeger, superintendent of the department of public safety.

Identified.

Although identified by a local witness as one of the two men seen walking up Third street to a waiting car shortly after the murder, and as being at a beer tavern in Illinois, with Johnson, the night before the slaying, Orsucci continued this morning to deny he was a participant in the crime or in the cracking of two safes here. He stuck to his story that he was not away from Des Moines for two years, and denied that he was a pal of Johnson.

Mrs. Dessie Johnson, wife of Gale, is still in custody for investigation. She refuses to make a statement.

PETITIONER'S EXHIBIT 23.

The Daily Hawkeye Gazette, Burlington, Iowa, August 20, 1934:

MURDER CHARGE
IS DISMISSED

Tom Orsucci, Des Moines,
Held in Sauer Killing
Probe, Released

Thomas Orsucci, Des Moines, Ia., charged with murder in the investigation of the slaying of F. W. Sauer, police captain last May, was released from custody today, the charge being dismissed by Justice of the Peace Frank Haskell on motion of County Attorney J. A. Dailey, Jr.

Although no formal statement was issued by the authorities, it is understood that investigations relative to Orsucci's possible connection with the crime are to continue, but that the evidence in the hands of officials at this time is insufficient to warrant keeping him in custody.

Orsucci was arrested in Des Moines on July 12, and returned to Burlington as a suspect. Representatives of the sheriff's office and of the police department, participating in the probe, have checked history that he was in Des Moines at the time the crime was committed, and it is reported the dismissal recommendation resulted from information thus obtained.

County Attorney J. A. Dailey, Jr., announced this morning that further evidence linking Gale Johnson with the murder of the police captain has been uncovered, and regards the state's case against him as strengthened. He declined to comment as to details. Johnson under formal charges of murder, is still in the state penitentiary at Fort Madison.

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Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 32

GALE H. JOHNSON,
Petitioner,

vs.

JOHN E. BENNETT, WARDEN, IOWA STATE PENITENTIARY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

RONALD L. CARLSON,
College of Law,
University of Iowa,
Iowa City, Iowa,
Counsel for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1131.

GALE H. JOHNSON,

Petitioner,

vs.

JOHN E. BENNETT, WARDEN, IOWA STATE PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

OPINION BELOW.

The orders of the United States District Court, Southern District of Iowa, are found at A. 38 and A. 57 and are not officially reported. The opinion of the United States Court of Appeals for the Eighth Circuit appears at A. 71, and is reported at 386 F. 2d 677 (1967).

JURISDICTION.

The judgment of the United States Court of Appeals was entered on November 28, 1967. Petition for writ of certiorari was filed on February 19, 1968, and certiorari was granted April 1, 1968. The jurisdiction of this court is invoked under 28 U. S. C. Section 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

The Constitution of the United States, Article XIV, Sec. 1: "No state shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 13880, Iowa Code (1931): "Defense witnesses at expense of state. Witnesses for the defense shall be subpoenaed at the expense of the county only upon the order of the court or judge thereof before which the case is pending, made upon a satisfactory showing that the witnesses are material and necessary for the defense, which order may be made at the time of the trial or other disposition of the case. The board of supervisors shall not allow any claims for fees of witnesses not thus authorized."

QUESTIONS PRESENTED.

Was the accused deprived of a fair trial when a witness subpoenaed by the accused was jailed during the term of the accused's trial, where the law enforcement office charged with the duty of serving said subpoena incorrectly reported to court and counsel that the sought witness was confined in a mental institution?

When the defendant introduces proof of alibi, may a state constitutionally shift the burden of proof to the accused and require the defendant to prove his absence from the scene of a crime as a condition for acquittal?

Is proof of the prosecutor's complicity in the preparation of false evidence required to reverse a conviction obtained after a trial in which the false evidence was introduced by the state?

STATEMENT.

Gale Johnson was indicted for the murder of a police officer in Burlington, Iowa, which fatality occurred on the morning of May 27, 1934, at approximately 5:30 a.m. (A. 84). He entered a plea of not guilty to this indictment, and the case went to trial on November 13, 1934 (A. 38-39). Although the defendant did not take the stand, he sharply disputed his guilt and his presence at the scene of the crime. Several witnesses testified that they saw the defendant in his home city of Des Moines, Iowa, on the day of the fatality; Des Moines being situated approximately 165 miles from Burlington. These witnesses included the owner of a gas station who related that he filled the tank of the defendant's car in Des Moines at about the time of the Burlington fatality, and the owner of a business establishment who saw the defendant in his place of business on the same morning (A. 103, A. 105).

Bearing adversely on the testimony of these alibi witnesses, the prosecution produced two notes allegedly written by the petitioner for secret transmittal to persons outside the penitentiary, the petitioner by these notes purporting to direct the preparation of the alibi defense (Pet. Ex. 16, 18, A. 126; Habeas Corpus hearing transcript, hereafter referred to as HR. 80-82). Evidence presented in petitioner's habeas corpus trial below demonstrates that these notes were not prepared by Gale Johnson, and this false evidence has now been repudiated by both the state and the petitioner (A. 56, 120; Resp. Ex. 2, A. 128; HR. 197).

At the petitioner's 1934 trial, the fraudulent notes were introduced through the testimony of two felons who were incarcerated at the prison where Gale Johnson was being held (A. 87-89). Upon trial of *State* v. *Johnson* these prisoners were charged with providing, for reward and gain

promised them by the state, assistance in the prosecution's effort to convict Gale Johnson. This charge was made by Mr. Yates, a witness who stated that he had himself received an offer of money to help the authorities in this project, which offer he refused (A. 107-109). The state's response to this assertion appears in closing argument to the jury at A. 110.

In addition to the notes, another area of testimony is material to the questions presented for review. There were no eyewitnesses to the fatality itself, but the state produced two witnesses who identified the defendant as one of two men fleeing the scene shortly after the homicide. The witnesses saw the two murder suspects only briefly from significant distances under circumstances of visual obstruction (A. 74). Their identification of the petitioner was made some time after the occurrence of the crime, and it appears that one of the witnesses also made an identification of another man along with Gale Johnson as implicated in the homicide. This other man whom the witness purportedly observed was Thomas Orsucci (Pet. Ex. 24, 20, A. 130, 132; HR. 154, 157). Mr. Orsucci was arrested, brought to Burlington, and charged with murder (A. 117, 132). This identification was later proven to be in error. As a result, Mr. Orsucci was released from custody on August 20, 1934 (Pet. Ex. 23, A. 133; HR. 158).

When Gale Johnson's case later came on for trial, Mr. Johnson reasoned that Orsucci's testimony would weigh heavily with the jury in determining whether to believe the witnesses who placed him in Des Moines, as opposed to those who claimed they saw him in Burlington on the morning of the homicide. In addition, the Burlington authorities had apparently announced in advance of trial that Orsucci had been identified as being in a tavern with Johnson in the Burlington area the night before the fatality (A. 131). Mr. Johnson applied to the trial court, requesting that a

subpoena issue for Thomas Orsucci (A. 92). The trial court issued the subpoena, and it was sent to Polk County, Iowa, Sheriff's office for service on the witness. Shortly thereafter, that sheriff's office advised that Orsucci was not served with subpoena because he was institutionalized at the Clarinda mental hospital (Pet. Ex. 3, A. 125; HR. 17). This was incorrect. Mr. Orsucci was being held in the Polk County jail at the time that this information respecting institutionalization was being supplied by the sheriff's office (A. 59, n. 1; 77; 117). No transfer of the witness to the Clarinda mental institution took place, and the record is void of any evidence that such a transfer was ever contemplated (A. 34, 39, 77).

In view of the fact that various witnesses had testified that Gale Johnson was in and about Des Moines near the time of the homicide in Burlington, the trial court specifically directed the jury regarding the burden of proof to be cast upon the accused. The court charged the jury that in order to acquit the defendant on the basis that defendant may have been elsewhere at the time of the crime, the defendant was required to prove that he was elsewhere.[1] Petitioner's original trial concluded on Novem-

1. Jury instruction 16, objected to by the defense, is found at A. 94 and stated as follows:

> 16. Evidence has been admitted on behalf of the defendant of what is known as an alibi, which means that the defendant at the time that the alleged murder is charged to have been committed, was at another place so that he could not have committed the same. You are instructed that such a defense is proper and legitimate as any other, and you are also instructed that you scan the proof of alibi with care and caution, and all the evidence upon this point both for and against this claim of alibi should be scrutinized with care and carefully considered by the jury.
>
> The burden is upon the defendant to prove this defense by a preponderance of the evidence, that is, by the greater weight or superior evidence. The defense of alibi to be entitled to be considered as established must show that at the very time of the commission of the crime the accused was at another

ber 24, 1934. The jury rejected the charge of first degree murder, and instead rendered a verdict of guilty of murder in the second degree (A. 97). On December 10, 1934, the trial court sentenced the petitioner to life imprisonment (A. 102), which sentence he continues to serve. His conviction was affirmed on appeal. *State* v. *Johnson*, 221 Iowa 8, 264 N. W. 596. See also *State* v. *Johnson*, 221 Iowa 8, 21, 267 N. W. 91, correcting certain errors made by the Iowa Supreme Court in its first opinion.

After several of the significant facts disclosed above were discovered, the petitioner attempted to obtain an evidentiary hearing in state habeas corpus. His efforts were unsuccessful (A. 9-10). His last petition in this regard resulted in a summary order of the Iowa Supreme Court denying relief (A. 20). Petitioner thereafter filed a petition for federal habeas corpus on February 16, 1966 (A. 4). His petition was originally denied without hearing (A. 38). After counsel appeared for the petitioner and moved to reconsider, an evidentiary hearing was ordered (A. 49, 57). At this hearing, a leading expert on handwriting analysis demonstrated that the notes produced by the state at petitioner's original trial were not written by the petitioner, contrary to the trial testimony of the state at that time (A. 117-125). These notes were also submitted to the state's present handwriting expert at the Bureau of Criminal Investigation, and this expert fully agreed that the petitioner did not author the inculpatory notes (Resp. Ex.

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place so far away, or under such circumstances that he could not with ordinary exertion have reached the place where the crime was committed so as to have committed the same. If by a preponderance of the evidence the defendant has so shown, the defense must be considered established and the defendant would be entitled to an acquittal. But if the proof of alibi has failed so to show, you will not consider it established or proved. The evidence upon that point is to be considered by the jury, and if upon the whole case including the evidence of an alibi, there is a reasonable doubt of defendant's guilt, you should acquit him.

2, A. 128; HR. 197). As a result, the respondent conceded that the introduction of the notes at petitioner's original trial was incorrect (A. 56, HR. 197). In addition, the important facts concerning the incarceration of witness Orsucci during petitioner's original trial were spread upon the record at his habeas corpus trial.

Notwithstanding the cited evidence, the United States District Court denied habeas corpus relief (A. 57). The decision of the District Court was affirmed on appeal (A. 71), the Court of Appeals emphasizing the need to present direct proof of prosecutorial complicity in the fabrication of evidence or suppression of testimony in order to successfully attack a conviction. The court below stated: "So far as we have been able to ascertain, all the Supreme Court cases setting aside convictions for want of due process by reason of the reception of false testimony are based upon the knowledge of the prosecutor that the testimony received is false or knowledge that material evidence has been suppressed." (A. 75.)

After the District Court denied habeas relief, it issued a certificate of probable cause to the petitioner to appeal, the court indicating concern over the Iowa trial court's procedure in shifting the burden of proof to the accused (A. 66). The District Court had previously characterized as confusing and inconsistent the jury charge which had this effect (A. 43). On appeal, the Court of Appeals found that this jury instruction did place the burden of proof on the accused, and pointed out that the great weight of authority supported the view that such an instruction is erroneous. However, the court below noted that the Supreme Court of the United States has not passed upon the validity of this type of instruction (A. 80).

SUMMARY OF ARGUMENT.

A. When governmental suppression of evidence occurs, due process of law is violated regardless of whether the suppressing official is the prosecutor or a law enforcement officer. Deception by a governmental officer when the accused is engaged in the crucial business of securing trial witnesses is antagonistic to the due process mandate.

The record in the instant case indicates that a defense witness subpoenaed under order of the trial court was withheld from the trial of the case under circumstances which constituted suppression of evidence. The suppressed witness had been a central figure in the subject murder investigation, and his presence at Gale Johnson's trial was ordered by the trial court under a state statute which required such court to establish the materiality of the sought evidence prior to issuance of the subpoena. Allowing suppression of the witness in these circumstances would authorize police officers, and not the defendant, to decide with impunity which witnesses the accused would be permitted to present in his defense. Such a concept is at war with due process of law.

B. False evidence in the form of forged notes was introduced by the prosecution at petitioner's trial. The petitioner, on trial for his life, was afforded scant opportunity to view these notes prior to trial, notwithstanding the fact that the prosecution had possession of these items several months in advance. The employment of such evidence achieved "pollution of the waters of justice" and deprived the conviction of its due process base. The view of the court below, to the effect that there is no unsettling vice in the employment of tainted evidence absent a showing of prosecutorial complicity, should be corrected. The decisions of this court are clear on the point that the due process

mandate in the false evidence cases is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.

C. Significant decisional authority indicates that an issue of marked constitutional significance is posed by virtue of the fact that the burden of proving alibi was placed upon the defendant. *Glover* v. *United States,* 147 Fed. 426, takes the position that such a procedure conflicts with the presumption of innocence, a fundamental rule of our criminal law. The jury was told in the prosecution's closing argument and by the court's instructions that in order for the defendant to prevail under his claim of non-presence at the scene of the crime, he was required to prove that he was elsewhere. Inasmuch as the burden should fall on the government to establish the guilt of the accused in the face of any conflicting evidence, including the burden of proving the presence of the accused at the scene of the crime where that is an essential element of the state's case, the procedure employed in the subject cause was fatally in error.

ARGUMENT.

A. SUPPRESSION OF EVIDENCE BY THE GOVERNMENT IN A CRIMINAL PROSECUTION COLLIDES WITH FUNDAMENTAL PRECEPTS OF FAIRNESS AND DUE PROCESS.

The fact that a defense witness was held in jail during the trial of the accused, and that a misrepresentation respecting the whereabouts of the witness was promulgated by the authorities, does not appear seriously disputed in this proceeding. Indeed, the federal District Court below found that Thomas Orsucci was incarcerated in the Polk County jail from November 15, 1934 to December 8, 1934, and that the sheriff's return was made on November 19, 1934 (A. 39; 59, n. 1). The Court of Appeals reasoned that the evidence on the point "establishes a prima facie case that the return of the Polk County sheriff is false." (A. 77.) The Court of Appeals did not consider this deception decisive, however, apparently for two reasons. First, the court pointed to an absence of evidence demonstrating that the trial prosecutor himself had knowledge of the false reporting (A. 77). Second, the court questioned whether the witness sought by the subpoena was of value to the defense (A. 79).

Petitioner respectfully contends that active suppression of evidence by the government vitiates the conviction of an accused person, whether that suppression is accomplished by the trial prosecutor or another arm of the state. *Barbee* v. *Warden, Maryland Penitentiary,* 331 F. 2d 842, 846 is a well reasoned decision which points out that the duty to desist from suppression extends to all officers in the state's official process. *Barbee* involved a federal habeas corpus attack upon a state court conviction wherein the

state prosecutor failed, either through lack of knowledge or for some other reason, to disclose evidence relevant to the defense, which evidence was in the possession of the police. The state contended that defendant was not entitled to habeas relief because he failed to show that the prosecuting attorney himself participated in the suppression of the evidence. The Court of Appeals ruled that failure to reveal material evidence is harmful to a defendant whether such withholding is accomplished by the prosecutor or another officer of the government. "The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. . . . The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused." 331 F. 2d at 846. See Comment, 42 N. Y. U. L. Rev. 764, 766 (1967). *Barbee* further indicates that in cases of active misconduct by the prosecution, as opposed to passive nondisclosure of evidence, the conviction should be set aside without inquiring into whether the defendant has been prejudiced. In view of the record, the misconduct in the case at bar would appear to fall into the first category.

This Court made abundantly clear in *Brady* v. *Maryland*, 373 U. S. 83, 87, that suppression by the prosecution of material evidence favorable to an accused violates due process. As in the instant case, the accused in *Brady* requested production of the desired evidence, only to have certain of that evidence suppressed. Such suppression cannot be tolerated because of the hallmark principle of American jurisprudence that society wins in a criminal case only when the accused is treated fairly. 83 U. S. at 87. See also *Giles* v. *Maryland*, 386 U. S. 66, 70, 74, which condemns suppression of evidence relevant to the cred-

ibility of a government witness, credibility constituting a critical issue in the case.[2]

The instant matter would appear to present an especially aggravated situation. The witness sought by the defense had been specifically requested under an Iowa statute which authorized service of subpoenas at state expense only if the trial court found the witness to be "material and necessary" to the defense. Section 13880, Iowa Code (1931).[3] The Court of Appeals decision questioned the materiality of the evidence sought from Thomas Orsucci. However, at no point in its opinion did that court discuss the effect of the above statute on this issue, although the point was specifically raised below by the petitioner.[4] Petitioner's contention is that the trial court's 1934 issuance of the subpoena under the aforesaid statute stands as a prior ad-

2. Other significant decisions which apply the long-standing proscription against governmental suppression of evidence include *Pyle* v. *Kansas*, 317 U. S. 213; *Alcorta* v. *Texas*, 355 U. S. 28. See *Curran* v. *Delaware*, 259 F. 2d 707, 712-13 (suppression of evidence by an officer deemed fundamentally unfair; misconduct of police invalidated state court conviction in federal habeas corpus, and rule does not depend upon personal participation of prosecutor in misconduct); *Augenblick* v. *United States*, 377 F. 2d 586, 598 (In evidence-suppression cases, activities of investigating officials are generally attributed to the prosecution); *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 570-71; *Hamric* v. *Bailey*, 386 F. 2d 390. See also Note, 34 Brooklyn L. Rev. 269 (1968); Comment, 34 Tenn. L. Rev. 654, 660-63 (1967); Comment, 6 Duquesne L. Rev. 41, 45-56 (1967); Note, 2 Suffolk L. Rev. 272, 286-87 (1968).

On the importance of safeguarding the accused's right to subpoena witnesses, see *Washington* v. *Texas*, 388 U. S. 14.

3. The cited section controlled the issuance of defense subpoenas at the time of the Johnson trial in 1934. A similar section appears in the 1966 Code of Iowa, Section 781.2. The statute underwent minor revision in 1967, the legislature deleting the words "or judge thereof" from the first sentence of the provision. Acts 1967 (62 G. A.) ch. 400. Otherwise, the section today remains in the same form as the section contained in the 1931 Code.

4. Petitioner's Brief, United States Court of Appeals, pp. 12-13; Petitioner's Reply Brief, p. 4.

judication of materiality, in light of the statute's requirement that the subpoenaed witness must be material to the defense. The trial court was on the scene in 1934 when it issued the subpoena under these conditions; it would appear inappropriate now to disturb that finding.

That Thomas Orsucci occupied a central role in the events which occurred in Burlington, Iowa, in 1934 appears to be beyond dispute. He was charged with the murder in question, released, and later incarcerated during the petitioner's trial (A. 33, 34; Pet. Ex. 24, A. 130, HR. 154; Pet. Ex. 20, A. 132, HR. 157; Pet. Ex. 23, A. 133, HR. 158). His testimony appears both relevant and admissible. The petitioner selected him as a source of testimony for jury consideration, and it would seem that the petitioner and his counsel should be permitted to determine the trial strategy for the defense. They should decide whom the accused will call as defense witnesses, and the decision should not be made for them by a police department or a sheriff's office through the incarceration of requested witnesses. Such an extra-judicial overruling of a decision by an accused person to call any witness is in conflict with the due process mandate.

B. THE EMPLOYMENT OF FALSE EVIDENCE IN SECURING THE CONVICTION OF AN ACCUSED PERSON DESTROYS THE VALIDITY OF SUCH CONVICTION.

The use of false documents against an accused person is antagonistic to the basic tenets of a civilized legal system. The record in this case indicates that false evidence found its way into the trial. Recent evidence appears to clearly establish petitioner's long-maintained stand on this issue, to wit: state's exhibits one and two at his original trial were not written by the petitioner, contrary to the state's testimony at that time.

Because handwriting analysis is crucial to this issue, the testimony of a leading authority in this field has been set forth at some length in the Appendix (A. 117-125). Professor Winsor Moore, a member of the American Society of Questioned Document Examiners and the American Academy of Forensic Sciences, carefully detailed the dissimilarities between the false notes (original state's exhibits 1 & 2), and the petitioner's 1934 handwriting which appears on an exemplar card petitioner was required to complete prior to trial (Pet. Ex. 15; A. 127; HR. 77). Professor Moore explained that any attempt to disguise the handwriting or printing, should the petitioner have printed the introduced evidence with a strained or abnormal writing style, would be easily detectable. His testimony is definite that the petitioner did not write the notes (A. 120).

With appreciated frankness the state has indicated agreement with this position (A. 56; HR. 197). Prior to the habeas corpus hearing below, the state submitted the challenged exhibits to the questioned documents examiner at the Iowa Bureau of Criminal Investigation, and his findings are in accord with those of Professor Moore (Resp. Ex. 2, A. 128; HR. 197).

The situation was considerably different in Burlington, Iowa, in 1934, however. At that time the state produced a handwriting analyst who testified before the jury that the petitioner had prepared the notes, a proposition explored by the prosecutor in closing argument (A. 110-112). In fact, the subject of the notes in question occupied all or part of the testimony of five state witnesses at the original trial (A. 87-89; Original Transcript Record 166-205). There, after establishing that the petitioner printed the exemplar card heretofore mentioned, the state went on to illustrate to the jury that the person who printed the exemplar card (Gale Johnson) was the same person who printed the notes, state's exhibits one and two. The impor-

tance attached to the notes as evidence is indicated by their numeral position in the chain of state exhibits, and is borne out by examination of the closing argument of the prosecutor. He pressed home to the jury testimony concerning the evidence in pointing them to the "fact" that Gale Johnson authored the notes in question—a "fact" now conceded to be untrue. Attribution of these notes to the petitioner cast him in a very bad light, and in a case in which the jury's assessment of alibi evidence was crucial, state's exhibit 2 (A. 126) was especially damaging. The considerable lengths to which the state went to produce the improper evidence, substantial attendant testimony relating to the notes after they were received in evidence, and reliance by the prosecution on the false documents in closing argument indicate that prejudicial error within the meaning of *Chapman* v. *California,* 386 U. S. 18, occurred in the trial proceedings. *Anderson* v. *Nelson,* 88 S. Ct. 1133; *Fontaine* v. *California,* 88 S. Ct. 1229.

The court below did not question the material role played by the false evidence in petitioner's trial but again placed major reliance on the absence of proof of prosecutorial complicity in preparation of the forgeries. The Court of Appeals stated that all the Supreme Court cases setting aside convictions because of false evidence are based upon guilty knowledge of the prosecutor, and further stated that this is the proper rule (A. 75). This position appears clearly erroneous in view of this court's pronouncements in *Brady* v. *Maryland,* 373 U. S. 83, 87; *Pyle* v. *Kansas,* 317 U. S. 213; and *Napue* v. *Illinois,* 360 U. S. 264, 269. The *Brady* decision illustrates that the due process mandate in the false evidence cases "is not punishment of society for the misdeeds of a prosecutor but avoidance of an unfair trial to the accused." See Note, 74 Yale L. J. 136, 142 (1964). *Pyle* v. *Kansas* was summarized in *Curran* v. *Delaware,* 259 F. 2d 707, 713: "An examination of

the record in the *Pyle* case discloses, as the learned Judge below pointed out, that the prosecuting officer was in no wise a party to or cognizant of the perjured testimony given by certain witnesses of the State of Kansas. . . ." The *Curran* case also involved the production of false evidence, and the United States Court of Appeals there concluded that the introduction of false evidence caused the defendant's trial to pass the line of tolerable imperfection and fall into the field of fundamental unfairness.

In *Jones* v. *Commonwealth of Kentucky,* 97 F. 2d 335, 338, defendant was convicted in state court of murder upon the testimony of two witnesses, one of whom testified to the decedent's dying declaration. New evidence was presented in federal habeas corpus indicating that the witness who allegedly heard the dying declaration was not in fact present at the demise of the deceased and did not have knowledge of the things she testified to. The federal Court of Appeals noted that the infirmity of the trial evidence was not disclosed until after conviction, and the court's decision dealt with the problem of false evidence in criminal trials wherein the falsity is unknown to the prosecuting officers. The Court concluded that due process must condemn with "equal abhorrence" a conviction based upon false evidence either known or unknown to the prosecutor.

The *Jones* case also made the point that the defect in the trial evidence might have been discovered "had reasonable opportunity for investigation been accorded the defendant and his counsel." 97 F. 2d at 338. The statement raises a point relevant to the instant case as well. The record indicates that the trial prosecutor received the subject notes in July, 1934, and that he held them for several months before giving notice of their existence to the accused (A. 87, 90). Iowa law requires that the accused be given notice of the state's evidence prior to trial,[5] and

5. Section 780.10, Iowa Code (1966), formerly Section 13851, Iowa Code (1931).

in connection with other major portions of the state's case such notice was given with the indictment almost two months before trial. The state's notice respecting the notes was served on the petitioner in his jail cell six days before the start of the trial (A. 90; HR. 181-82), and not upon his attorney. Petitioner wrote to his lawyer respecting the new evidence immediately but by the time the correspondence was received trial counsel was able to visit with the petitioner only briefly before trial respecting this new development (A. 60-61). The prosecution's withholding of this notice respecting the false notes, the notes having been in the prosecution's hands for several months, afforded petitioner scarce opportunity to subject the evidence to the detailed screening by an expert which would have revealed its falsity.

The genesis of the false notes remains shrouded in mystery. Mr. Yates, a witness for the defense, was about to disclose his knowledge respecting their preparation, but he was cut off from further testimony in this regard (A. 108). In analyzing the question of who prepared the notes, the record does not contain direct proof on this issue. However, it is perhaps relevant to explore briefly the climate created at the jail from which the forgeries came. Mr. Yates testified that the trial prosecutor went into the penitentiary and offered him a sum of money, to wit $25.00, to provide the names of certain of petitioner's defense witnesses (A. 108-9). He claimed that other offers and promises had been given to the prisoners who ultimately produced the false notes. In closing argument the prosecutor responded to this allegation by saying, "Before I go into that I want to say that the State would have been glad to have paid Yates $25.00 to get the names of the alibi witnesses." (A. 110.) If this statement confirms Yates' testimony respecting offered pecuniary inducements, it would appear that a climate of encouragement may have

been created by the prosecution for the preparation of false evidence.

Exactly who was guilty of forging the notes may be the subject of conjecture. But one cardinal fact set forth in the record appears beyond dispute. That is the fact that all the current evidence based upon modern skills and techniques indicates clearly that Gale Johnson did not author the inculpatory notes which formed significant links in the chain of prosecution evidence at his trial. The important principles announced by this Court proscribing the employment of false evidence in criminal prosecutions form crucial protections for all accused persons, and the instant case poses a most significant example of the critical necessity for these rules.

C. THE PRESUMPTION OF INNOCENCE FORMS A BASIC PROTECTION FOR ALL ACCUSED PERSONS, AND CASTING THE BURDEN OF PROOF ON A DEFENDANT IN A CRIMINAL CASE VIOLATES THIS HISTORIC SAFEGUARD.

An issue which created major concern on the part of the United States District Court as well as the Court of Appeals was the important question raised by the method employed to shift the burden of proof to the accused. At the conclusion of petitioner's trial the jury was directed that in order for the petitioner to be acquitted by reason of his claim of non-presence at the scene of the crime, he was required to prove that he was elsewhere. Both of the courts below found that this direction to the jury placed the

6. Petitioner does not infer by this reference that any payment was made for the production of evidence known by the prosecution to be false. What petitioner does contend is that record testimony indicates that offers of financial reward were made to those willing to assist the prosecution. While the above-quoted reference to this subject in closing argument may not be completely clear, one reasonable interpretation would appear to be that the prosecution admitted that pecuniary offers had been made.

burden of proving alibi on the defendant (A. 42, 79), and *Glover* v. *United States,* 147 Fed. 426, 430-33, indicates that such a jury charge raises an issue of constitutional import.

Specifically, *Glover* takes the position that the giving of a burden-shifting alibi instruction constitutes prejudicial error and violates basic constitutional guarantees in criminal cases, to wit: the presumption of innocence and the rule that the accused must be proven guilty beyond a reasonable doubt.[7] Like the instant case, the jury instructions in *Glover* carried admonitions that if upon all the evidence, including that of alibi, a reasonable doubt as to guilt was created, then the defendant should be acquitted. The Court pointed out that inclusion of general reasonable doubt admonitions in the jury instructions did not cure the prejudice created by the specific alibi charge. The confusion promulgated by combining directions to acquit only if the defendant has proved a fact, then in the same instruction directing the jury that they may acquit without the defendant having proved such fact, seems apparent. The effect of this dual charging in the same instruction was well summarized by the Glover Court: "The two propositions embraced in the same paragraph are legally incongruous, and were well calculated to confuse the understanding of the jury. . . ." 147 Fed. at 433. The same proposition arose in *Thomas*

7. *Glover* v. *United States,* 147 Fed. 426, 431:

> The underlying vice in the foregoing charge of the court is in the assumption that in respect of the alibi the burden of proof "by a preponderance of evidence, that is, by the greater and superior evidence," shifted to the defendant. *It loses sight of the fundamental rule in criminal procedure that the defendant is presumed to be innocent of the offense with which he is charged;* that this is a continuing presumption which attends him like a guarding spirit throughout the ordeal of his trial, and imposes upon the prosecution the burden of overcoming such presumption by such weight of evidence as will satisfy the minds of the triers beyond a reasonable doubt of the defendant's guilt. This reasonable doubt in his favor applies to the evidence in its entirety and necessarily to any part of it. (Emphasis added.)

v. *United States,* 213 F. 2d 30, 32-34, with the instruction first shifting the burden of proof to the accused respecting alibi, then stating that if upon all the evidence a reasonable doubt of guilt had been raised "you should acquit." A result identical with *Glover* was reached by the Court of Appeals in *Thomas.*

The latter decision indicates the widespread impact of *Glover* on the American law. 213 F. 2d at 34. While the petitioner does not contend that a Court of Appeals decision is controlling in this Court, he does urge that *Glover, Thomas,* and attendant decisions are well reasoned and worthy of significant consideration here. Why the alibi instruction in the instant case is "legally incongruous," in the words of *Glover,* appears from what it tells the jury to do. The last sentence of the alibi instruction (A. 94), as well as other instructions given the jury (A. 95), permit the jury to acquit if any evidence creates a reasonable doubt of guilt. The jury is then told in the alibi instruction that the jury is justified in acquitting the accused only if the alibi was proven by a preponderance of the evidence. Adhering to this part of the instruction, a juror who entertained a reasonable doubt of guilt as a result of the alibi proof would nonetheless be required to convict the accused unless the alibi proof prevailed "by a preponderance of the evidence." An excellent analysis of the defects in Iowa approach to alibi, and the dilemma situation presented a juror under the challenged instruction, are set forth in Comment, 49 Iowa L. Rev. 590, 591 (1964):

> The difficulty with the rules applied by the Iowa courts is that they appear inconsistent, or even if they are not inconsistent, they may be nevertheless confusing to the jury. Under the first rule, [reasonable doubt instruction] it appears that the jury would be justified in acquitting the accused if any evidence, including that supporting an alibi, created a reasonable doubt. Under the second rule [alibi instruction] it seems that

> the jury would only be justified in acquitting the accused if the alibi was proven by a preponderance of the evidence. Assuming, therefore, that evidence of an alibi does not preponderate but such evidence is sufficient to raise a reasonable doubt, if the jury follows the instruction that the evidence of an alibi must preponderate, it must convict and disregard the instructions as to reasonable doubt.

Another anomaly presents itself under the Iowa rule:

> If the defendant testifies that he was not present at the scene of the crime, no burden of proof is cast upon him and his testimony raises only the question of credibility. Thus, the jury could acquit the defendant on the basis of alibi alone when the only proof is defendant's testimony. However, if he calls witnesses to corroborate his alibi, the defendant is said to have assumed the offensive and the burden of proof by a preponderance of the evidence rests upon him. 49 Iowa L. Rev. at 596.

It would appear that under this rule the defendant is presumed innocent until he presents proof of alibi, and then the presumption dissipates and the defendant must establish his non-presence at the scene of the crime by a preponderance of the evidence. *Glover* v. *United States,* 147 Fed. 426, indicates that this approach is antagonistic to the presumption of innocence, which presumption applies to all the issues in a criminal case, including the issue of whether the accused was present at the scene. A final question in this analysis concerns the basic nature of the rights deleteriously affected by this procedure.

The presumption of innocence was described in *Coffin* v. *United States,* 156 U. S. 432, 453, 461 as the "undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." The *Coffin* decision traces the history of this presumption of innocence from the early years of the common

law. See also *Deutsch* v. *United States,* 367 U. S. 456, 471. As stated in 2 Conrad, Modern Trial Evidence § 962 (1956):

> The presumption of innocence stands as one of the highlights of Anglo-American jurisprudence. In its most concise form, it may be stated that an accused in a criminal case is presumed innocent until his guilt has been established beyond a reasonable doubt. This presumption, one of the strongest known in the law, is a principle to which the accused is lawfully entitled, and not a gratuity. It is a substantial right accruing to the benefit of the accused upon every material fact necessary to constitute guilt. The presumption, a substantive common law right rather than a rule of evidence, makes it mandatory on the state to prove defendant's guilt, rather than on defendant to prove his innocence.

The point is well summarized in a recent decision, *People* v. *Morris,* 67 Cal. Rptr. 566, 567 (Cal. 1968):

> Penal Code, section 1096 declares in part that that "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal * * *." These significant words express a cardinal rule of Anglo-American criminal jurisprudence. The presumption intended originally to ameliorate the severity of the early English common law (5 A. L. R. 3rd 76), serves not to protect the guilty but to prevent conviction of the innocent. (*People* v. *Hill,* 77 Cal. App. 2d 287, 293, 175 P. 2d 45, and cases cited; Witkin, Calif. Crim. Proc., § 39, p. 332; 14 Cal. Jur. 2d 405.) It has been described as a fundamental right and an essential element of due process of law. (See 22-A C. J. S. Criminal Law § 581 pp. 335-337, and cases cited.) It is the capstone in the protective arch of a citizen's rights when accused of crime. . . .

See also Slovenko, Handbook of Criminal Procedure 587 (1967).

The Court of Appeals below pointed out that although the Supreme Court had not passed upon the validity of the jury charge involved here, the great weight of authority supported the view that the instruction was erroneous (A. 80). Indeed, the Iowa approach is followed in only a few states, and the practice of shifting the burden of proof to an accused on the issue of alibi has been castigated by the commentators.[8]

A feature of the lower court opinion requiring mention

8. Wigmore's current listing indicates that five jurisdictions, including Iowa, shift the burden to the accused on the question of alibi. 9 Wigmore, Evidence, Sec. 2512, n. 3 (1964 Supplement). See also I Wharton, Criminal Evidence 68-70 (12th ed. 1955). It does appear that Iowa is in a slim and shrinking minority on this question. As indicated in *Leland* v. *Oregon*, 343 U. S. 790, 798, the fact that a contrary practice is followed in the vast majority of states is not conclusive that the majority practice is the one which accords with due process, but that fact is plainly worth considering.

For criticism of the practice of shifting the burden of proof to the accused on the issue of alibi, see Underhill, Criminal Evidence, Sec. 441 (5th ed. 1956); McCormick, Evidence 683-84 (1954). See also *Commonwealth* v. *Gates*, 141 A. 2d 219, 223 (1958) (Musmanno dissenting opinion); 4 Wharton, Criminal Law and Procedure 772 (1957); Chamberlyane, Evidence, Sec. 973 (1911).

The treatment of burden of proof in the alibi cases has been the subject of considerable controversy in Iowa. The forceful dissenting opinions in *State* v. *La Mar*, 151 N. W. 2d 496, 504 (Iowa 1967) and *State* v. *Stump*, 254 Iowa 1181, 1203, 119 N. W. 2d 210, 223 (1963), underline the disagreement. There has been some tendency in certain decisions to treat alibi on the same basis as pleading and proof of insanity, and to consider the question controlled by *Leland* v. *Oregon*, 343 U. S. 790. The two concepts are distinct, however, in that alibi does not raise an affirmative defense. As stated in Underhill, Criminal Evidence, Sec. 441 (5th ed. 1956):

> In most criminal cases the state must prove that accused was not present because he was elsewhere. Proof of alibi thus appears to negative an essential element of the crime rather than set up affirmative matter. Further, it is difficult to compare alibi with insanity. The reason that some jurisdictions place on defendant the burden of proving insanity is that insanity is a departure from the norm; people are presumed to be sane. There is obviously no presumption that the defendant was present at the scene of the crime.

is the apparent confusion over the concept of retroactivity. The court, intimating that the questioned jury charge may be unconstitutional, questioned whether such a rule would inure to the benefit of this petitioner. This analysis appears to overlook the guiding principles set forth in *Stovall* v. *Denno,* 388 U. S. 293. The *Stovall* decision points out that litigants in cases which make clear a constitutional requirement always obtain to retroactive benefit of the rule, even though such rule may be prospectively applied for subsequent litigants. Petitioner here has presented an original question of marked constitutional importance, and respectfully submits that a holding by this Court in accord with *Glover, Thomas,* and allied cases would unquestionably apply to him, based upon "sound policies of decision making, rooted in the command of Article III of the Constitution . . ." *Stovall* v. *Denno,* 388 U. S. at 301. The question of retroactive application does not occupy the Court at this time. Should the Court in a future case wish to limit any announced rule to cases heard after this decision, the Court certainly may do so. Nothing in the concept of retroactivity would appear to deny Gale Johnson the benefit of the Court's ruling on the alibi question presented, or to limit the Court in other future cases.

Significant and well reasoned decisions indicate that fundamental safeguards in criminal prosecutions are deleteriously affected when a trial court shifts the burden of proof to the accused. The trial court took such action in the instant prosecution, an especially damaging step in a case where alibi was crucial to the defense. The instruction may well have been sufficient to tip the balance away from the accused, where the credibility of petitioner's alibi witnesses had already been undercut by the state's production of false evidence. Considerable reliance upon the burden cast upon the accused under the court's charge appears in the prosecutor's closing argument (A. 113-14). Tradi-

tional rules of burden of proof, reasonable doubt, and presumption of innocence in criminal cases condemn the increased burden the defendant was forced to bear in the instant case.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

RONALD L. CARLSON,
College of Law,
University of Iowa,
Iowa City, Iowa,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. [redacted] 32

GALE H. JOHNSON,
Petitioner,

vs.

JOHN E. BENNETT, WARDEN, IOWA STATE PENITENTIARY, FORT MADISON, IOWA,
Respondent.

BRIEF FOR THE RESPONDENT IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

RICHARD C. TURNER
Attorney General
State of Iowa
Des Moines, Iowa
WILLIAM A. CLAERHOUT
Assistant Attorney General
State of Iowa
Des Moines, Iowa
Attorneys for Respondent.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. _____ Misc.

GALE H. JOHNSON,
Petitioner,

vs.

JOHN E. BENNETT, WARDEN, IOWA STATE PENITENTIARY, FORT MADISON, IOWA,
Respondent.

BRIEF FOR THE RESPONDENT IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

CITATION TO OPINIONS BELOW

The petitioner's citations are deemed sufficient except that the opinion of the United States Court of Appeals has now been reported in 386 F.2d 677 (1967).

JURISDICTION

The statement of jurisdiction in petitioner's application is deemed sufficient.

CONSTITUTIONAL PROVISION

The citation of Amendment XIV, Sec. 1, Constitution of the United States, as quoted in petitioner's application is deemed sufficient.

QUESTIONS PRESENTED

1. Was there a suppression of evidence violative of due process of law in the petitioner's 1934 trial, where the sheriff erroneously reported on a subpoena return that one of the several requested defense witnesses was not available to testify?

2. Should the petitioner's thirty-four year old conviction be overturned on the ground that due process was denied by the admission of inculpatory notes at trial, allegedly written by the defendant and supported by expert testimony, the certainty of which is now contested by modern experts?

3. Does a state have the constitutional right to require a defendant to assume a limited burden of proof on the issue of "alibi", if he chooses to present that defense?

STATEMENT OF THE FACTS

The petitioner was arrested in Des Moines, Iowa, on May 30, 1934, for the shotgun slaying of Captain F. W. Sauer of the Burlington, Iowa, Police Department three days earlier. (Original trial record, hereafter referred to as "R.", p. 110). Although there was no eyewitness to the crime two persons did observe the petitioner and another man coming from the vicinity of the shooting and get into a dark V-8 Ford car after bending the license plate down (R. p. 83). The petitioner was seen carrying a sawed off shotgun at that time (R. p. 43, p. 82). An-

other witness recalled seeing a similar auto about 28 miles from Burlington, heading toward Des Moines at a high rate of speed on a dirt road approximately an hour to an hour and a half after the murder. Testimony was also presented by the State which placed the petitioner in Illinois, several miles east of Burlington, with a shotgun, the Friday night before the Sunday morning Captain Sauer was killed (R. p. 164). A V-8 Ford coupé found at the Des Moines home of the petitioner was subsequently taken to Burlington and identified by witnesses as like the car they testified seeing being driven out of town after the shooting (R. pp. 83-4).

The petitioner chose not to take the witness stand, but no less than eight of his defense witnesses testified that he was in Des Moines the night before and the morning of the Burlington shooting. One requested witness, a former suspect in the case, Thomas Orsucci, was not obtained because the Polk County (Des Moines) Sheriff's office made a return on November 19, 1934, indicating that the witness was detained in the Clarinda institution for the insane. A later search of the records revealed that Mr. Orsucci, also known as Thomas Sanders, was released from jail on December 8, 1934, two days before the petitioner was sentenced (Pl. Ex. 3; Record, Federal District Court Habeas Corpus Hearing, p. 17, hereafter referred to as "H.R."). Mr. Orsucci executed an affidavit on the behalf of the petitioner on February 11, 1949, to the effect that he had knowledge of certain facts pertinent to the defense, but no attempt was ever made to perpetuate his testimony. Mr. Orsucci died in 1965 (Pl. Ex. 12 and 13, H.R. p. 25).

The State produced other evidence at trial which included an incriminating conversation between the petitioner and another inmate (R. p. 171, p. 203). Certain in-

culpatory notes which the petitioner allegedly wrote were also introduced and expert testimony regarding the handwriting was used in support. The defendant presented strong rebuttal to the notes and the testimony of the other inmates, by the testimony of yet another prisoner, named Yates (R. p. 275).

After one unsuccessful attempt in Federal District Court in 1961, the petitioner again raised his claims in 1966 and was granted an evidentiary hearing before that court (Petitioner's application, Appendix A, pp. 19-32). The writ of habeas corpus was denied and appeal was made to the Court of Appeals. That court also found that the petitioner had failed to establish violation of federal constitutional rights and affirmed the judgment of the lower court (Petitioner's application, Appendix B, pp. 34-46).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The initial allegation presented by the petitioner in support of his application is based on the erroneous return of a subpoena from the Sheriff of Polk County in 1934, that one of the requested witnesses, Thomas Orsucci, was in the Clarinda institution for the insane. It was revealed in the evidentiary hearing before the Federal District Court that Mr. Orsucci was also known by the name of Thomas Sanders and had been in the Polk County Jail from November 15, 1934 to December 8, 1934, under the last mentioned name (H.R. pp. 18-20). The petitioner again met Mr. Orsucci in 1936 or 1937, while both were in the state penitentiary (H.R. pp. 33-4). Approximately twelve years later, an affidavit was obtained, in which Mr. Orsucci claimed to have "knowledge of certain facts pertinent to the defense" (H.R. p. 36). Another fifteen years went by without gaining any record of just what Mr. Orsucci knew about the case and the doubt was made permanent by his death in 1965 (H.R. p. 25).

It is uncontroverted that Mr. Orsucci, if he would have testified, would have testified that one of the state witnesses who saw the petitioner near the scene of the crime, had previously "mistakenly" identified him (Orsucci) in connection with the murder (H.R. pp. 48-9). In other words, Thomas Orsucci would have been used for attempted impeachment of one of the two eyewitnesses for the state.

It should be obvious why the lower courts were unable to apply the suppression rule of *Brady* v. *Maryland*, 373 U.S. 83, as the petitioner would prefer. Assuming arguendo that there was malice by the Sheriff of Polk County with regard to the Burlington (Des Moines County) prosecution, there is a clear lack of materiality of such proposition, to the guilt or punishment of the accused. The unusual age of this case, combined with the death of the witness and the lack of concern by the petitioner while the witness was alive (H.R. p. 56), all serve to highlight the good judgment of the lower court's rulings. We seriously doubt that the administration of criminal justice would be aided by any rule which would resurrect the unrecorded testimony of the dead and embellish it with importance it apparently did not have when the witness was alive and available.

2. The petitioner's second ground for granting the requested writ of certiorari is that the courts below failed to vitiate his conviction for the reason that inculpatory notes allegedly written by him were used in evidence and are now subject to question according to more modern handwriting analysis. These notes were received by a record clerk at the penitentiary and turned over to the Des Moines County (Burlington) Attorney (R. p. 167; H.R. p. 68). Following examination of the notes by a

Chicago, Illinois handwriting expert who gave the opinion that the petitioner had written them, notice of their expected use at trial was personally served on the petitioner on November 8, 1934 (H.R. p. 72). Because the trial did not begin until November 13, 1934, the accused was not given notice on the "eve" of the trial as it is stated in his argument (Application, p. 11), and the notice was in full accord with the Iowa law (Section 780.10, 1966 Code of Iowa, formerly Section 13851, Code of Iowa 1931). The petitioner's attorneys did not raise the issue on appeal and the petitioner did not and does not claim they were incompetent (H.R. pp. 73-4). The defense presented a forceful rebuttal to the authenticity of the notes and the court cautioned the jury regarding what was called "the lowest order of evidence" (R. pp. 275-294; R. p. 376).

The court below was well aware of the long standing rule against the knowing use of false evidence by the prosecution as shown by the reference to *Miller* v. *Pate*, 386 U.S. 1, in its opinion (Application, Appendix B, p. 37; 386 F.2d 677, 679-680). The "significant role played by false evidence" was not, as the petitioner correctly indicates, questioned by the Court of Appeals. The reason for this omission is refreshingly clear on at least three points. First, whether or not the notes were "false evidence" is still at the mercy of expert opinion. Second, there is no showing by the petitioner that the expert opinion was not honest or that the prosecution was not justified in using it in 1934. Third, and of utmost importance, is the reason that the notes did not take a "significant role" in the trial of that case. While the petitioner focuses upon five state witnesses and the notes, his argument is somewhat less persuasive when the original trial transcript is considered. The State presented a total of twenty-eight witnesses, the

defense, fifteen. While a mere head count of witnesses proves nothing, reference to the testimony of the State's other twenty-three witnesses provides substantial support for the conviction without the notes and accompanying testimony.

Because it is unknown whether the 1934 jury gave any weight to the notes, and whether future handwriting experts may disagree with the present experts, the courts below were clearly correct in refusing to create a new rule or apply a well established one to the hopelessly unstable circumstances on which the petitioner has rested his case.

3. That last reason submitted by the petitioner in support of his application is based on a single instruction presented to the jury in his 1934 trial (Appendix C of Petitioner's application R. pp. 374-5). The essence of the contested instruction, the law of Iowa and several other states, is that when an accused chooses the defense of "alibi," he also accepts the burden of proof to sustain it by a preponderance of the evidence. That is, if he chooses to prove he was at a place other than where the State's evidence shows he was, then he must also accept a limited burden of proof.

The wisdom of the "alibi" instruction has long been considered by the Iowa Supreme Court. Both the majority view and the dissent have recorded succinct statements of their positions in *State* v. *Stump*, 254 Iowa 1181, 119 N.W.2d 210, so that further repetition here appears unnecessary. While some have been critical of the alibi instruction rule, it should be noted that such discussions do not assist in the discovery of a due process violation on any particular set of facts. Logic demands the conclusion that even if the wisdom of the rule is questionable, it need not assume the magnitude of constitutional error. Thus, in

spite of the petitioner's well reasoned argument on the theory of alibi, the question remains whether or not his right to due process was violated in 1934.

Admittedly, a majority of the states and perhaps all Federal jurisdictions do not agree with the alibi instruction. The court below recognized this authority, but wisely observed that this case did not show deprivation of Constitutional right. The first good reason for this conclusion appears on the very face of the alibi instruction where the court ordered the jury to acquit the defendant, if upon the whole case, including the alibi, there was a reasonable doubt of guilt. Of course, it is generally observed that instructions should not be viewed piecemeal when attempting to determine fairness to a defendant. Thus, when certain other instructions in the trial below are studied, it becomes clear that any argument that petitioner was denied his right to presumption of innocence or reasonable doubt must fail when confronted by the very words of those other instructions (R. pp. 364-5). It should also be obvious that the petitioner was neither forced to take the witness stand nor was he obligated in any way to raise the defense of alibi and thereby assume a limited burden of proof.

While the Supreme Court has not directly faced the alibi instruction issue, it does appear that a similar matter has been considered. Due process was found not to have been violated, where the defendant was required to prove his defense of insanity. *Leland* v. *Oregon*, 343 U.S. 790. It is especially noteworthy that the standard used in the approved insanity defense was "beyond a reasonable doubt," whereas the alibi instruction requires the lower degree of "by a preponderance of the evidence."

Although the petitioner has discounted the issue of retroactivity because of this Court's decision in *Stovall* v.

Denno, 388 U.S. 293, his argument on the question is somewhat unclear. He offers *Glover* v. *United States,* 147 Fed. 426, as support for his contention that the alibi instruction is unconstitutional. If that proposition is correct, then the requested due process right against the alibi instruction has existed since at least 1906 A.D. However, we doubt if this is so and agree with the Court of Appeals below, where the opinion states:

> "No challenge was made to the alibi instruction on constitutional grounds in the defendant's trial resulting in his conviction or in his appeal therefrom. We have little doubt that such challenge, if then made, would have been rejected. We do not believe that the challenge now made, even in the event it is entitled to be upheld under present day standards, would be given retroactive application to the 1934 conviction." (Application, Appendix A, p. 45; 386 F.2d at page 683).

While the petitioner relies on a case over half a century old, he also appears to ask that the Supreme Court establish the *Glover* rule as a matter of constitutional law now, apply it back thirty-four years and then wait for another case to determine an effective date of application. Because the petitioner's trial occurred so many years ago, the problems involved with declaring him a chance beneficiary of a newly found rule appear to be especially acute. It is for this reason that retroactivity is not an issue lightly cast aside.

We submit that the factors discussed above make this an unusually inappropriate case on which a question of constitutional dimension may be founded. It is not a question of hard cases making bad law, it is a matter of whether the petitioner can reasonably be said to have had a failure of constitutional protection on the facts of his case.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD C. TURNER
Attorney General of Iowa
WILLIAM A. CLAERHOUT
Assistant Attorney General
Attorneys for Respondent.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 32

GALE H. JOHNSON,

Petitioner,

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT.

RICHARD C. TURNER
Attorney General of Iowa
WILLIAM A. CLAERHOUT
Assistant Attorney General
State House
Des Moines, Iowa
Attorneys for Respondent-Appellee

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030
7-10-68—50

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1131

GALE H. JOHNSON,

Petitioner,

vs.

JOHN E. BENNETT, Warden, Iowa State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT.

OPINION BELOW.

The orders of the United States District Court, Southern District of Iowa, are found at A. 38 and A. 57 and are not officially reported. The opinion of the United States Court of Appeals for the Eighth Circuit appears at A. 71, and is reported at 386 F.2d 677 (1967).

JURISDICTION.

The judgment of the United States Court of Appeals was entered on November 28, 1967. Petition for writ of certiorari was filed on February 19, 1968, and certiorari was granted April 1, 1968. The jurisdiction of this court is invoked under 28 U. S. C., Section 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Constitution of the United States, Article XIV, Sec. 1: "No state shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 13880, Iowa Code (1931): "Defense witnesses at expense of state. Witnesses for the defense shall be subpoenaed at the expense of the county only upon the order of the court or judge thereof before which the case is pending, made upon a satisfactory showing that the witnesses are material and necessary for the defense, which order may be made at the time of the trial or other disposition of the case. The board of supervisors shall not allow any claims for fees of witnesses not thus authorized."

QUESTIONS PRESENTED

Did the incorrect subpoena return which prevented a purported defense impeachment witness from testifying at petitioner's trial constitute a violation of due process?

Should a conviction be overturned because of due process violation where the opinion testimony supporting

the state's introduction of inculpatory notes in 1934 is disputed by more recent opinion?

Does a state have the constitutional right to require a defendant choosing the defense of alibi to accept a limited burden of proof apart from the constant burden on the state to prove guilt beyond a reasonable doubt in order to obtain a conviction?

STATEMENT

Petitioner Gale H. Johnson was arrested on May 30, 1934, for the murder three days earlier of a Burlington, Iowa police captain (Original Transcript Record, hereafter referred to as T.R. 110, and Federal Habeas Corpus Evidentiary Hearing, hereafter referred to as H.R. 28). The Grand Jury returned an indictment for the crime of murder. (A. 84). On November 7, 1934, the petitioner was served with Notice of Additional Testimony informing him of certain notes purported to have been written by him while awaiting trial which would be offered in trial with the testimony of witnesses not present before the Grand Jury. (A. 87). The petitioner was represented by legal counsel, Mr. Doran and Mr. Finley, at that time and during trial. (A. 63, 91; H.R. 30).

Subsequent to a plea of not guilty, the petitioner's trial commenced on November 13, 1934. (T.R. 3). On November 16, 1934, the petitioner took advantage of an Iowa statute which provided for defense witnesses to be subpoenaed at the expense of the state by requesting fourteen or fifteen witnesses (the name May Vance was listed twice). (A. 92). After the court ordered the witnesses subpoenaed, the sheriff's return indicated that all had been served except Thomas Orsucci who was "in Clarinda institution for Insane." (Pet. Ex. 3, A. 125). Scant reference to Orsucci is found during the remainder of the trial. (T.R. 58, 310).

The petitioner's defense at trial was that he was in Des Moines, Iowa about the time of the murder and therefore could not have committed the offense in Burlington. Several of petitioner's acquaintances testified that he was in Des Moines on Saturday, May 26th (T.R. 247, 258) and on Sunday morning, the 27th, about the time of the murder (A. 103, 105). His wife and brother supported the contention (T.R. 255, 318). In contrast, the state presented testimony that petitioner was in Illinois on the 25th and 26th. (T.R. 143, 149). On the 26th, he had a sawed-off shotgun in his possession (T.R. 157). Deep contradictions resulted from the testimony of prison inmates regarding the source and purpose of the notes allegedly written by the petitioner. A defense witness named Yates categorically denied the state document examiner's testimony that petitioner had authored the notes in question (T.R. 309).

At the conclusion of the evidence and final arguments, the court presented twenty-four instructions to the jury, (T.R. 363-381) including the alibi instruction which is challenged herein. (A. 94; T.R. 374). On November 24, 1934, the jury returned a verdict of guilty of murder in the second degree, bypassing acquittal and the greater of the three possible penalties. (A. 97; T.R. 380). Petitioner's appeal to the Iowa Supreme Court was affirmed. *State* v. *Johnson,* 221 Iowa 8, 264 N.W. 596, 267 N.W. 91.

Two or three years after the conviction, petitioner was surprised when he met Thomas Orsucci in prison and learned that he was in the Polk County Jail and not the Clarinda institution during petitioner's trial. (H.R. 34). In 1949, the petitioner acquired an affidavit from Orsucci which stated that he "had knowledge of certain facts pertinent to [petitioner's] defense" and that he still had said information and could "produce it if requested." (A. 33). Orsucci died in 1965 without any apparent attempt

to perpetuate whatever his testimony would have been. (A. 60; H.R. 25, 56).

Petitioner filed a petition for writ of habeas corpus in the Supreme Court of Iowa on January 4, 1966. (A. 13). The petition was denied on January 6, 1966. (A. 20). A petition was then filed in Federal District Court (A. 4) on February 16, 1966 and an Order to Show Cause was filed on February 18, 1966. (A. 21).

The various proceedings which followed included an evidentiary hearing. (A. 49). In that hearing, the petitioner alleged that Orsucci was subpoenaed in 1934 so that he could relate how one of the two witnesses that had identified the petitioner running from the scene of the murder had mistakenly identified Orsucci as his companion. (A. 60; H.R. 48). Testimony was presented on behalf of petitioner by an expert witness contesting the validity of the 1934 handwriting analysis which indicated the petitioner authored the inculpatory notes. Respondent's handwriting expert agreed with the opinion. (A. 62; H.R. 108, 197). These issues, along with the question of whether or not the "alibi" instruction given in petitioner's trial destroyed his presumption of innocence, were considered by the court and relief was denied. (A. 47). The decision of the Federal District Court was affirmed by the Court of Appeals. (A. 71).

SUMMARY OF ARGUMENT

A. The uncontroverted use for which Thomas Orsucci was intended in the petitioner's trial was to show that one of the state's identification witnesses had previously identified him as the man fleeing the scene of the murder with the petitioner. To vitiate the conviction below based on due process violation, it is necessary that the evidence suppressed be favorable to the accused and material to his guilt or punishment.

The record below is free of any indication that the prosecuting attorney was responsible for the absence of the requested witness and no showing has been made that the erroneous return by a deputy sheriff in another part of the state was the product of mistake or malice. The materiality of the missing testimony did not reflect on the guilt or punishment of petitioner and was potentially unfavorable. The combination of acts and omissions by the petitioner over the many years since his trial represents his abandonment of any claim to remedy based on the testimony of a witness now deceased.

B. Notes alleged to have been written by the petitioner were introduced against him at trial. Strong rebuttal testimony and a court instruction severely inhibited any weight the jury may have given the notes despite the opinion of a document examiner that the accused authored them. The petitioner's claim of false evidence rests on opinion testimony and disregards the function of both the jury and expert witness. Due process does not demand the destruction of a conviction where the evidence of fraud is subject to opinion and no knowledge of it may be attributed to the prosecution.

C. The alibi instruction given to the jury created a separate and inferior burden of proof upon the accused but did not overcome presumption of innocence or the clear duty of the jury to acquit him if a reasonable doubt existed. The defendant was not obligated to use the alibi defense, take the witness stand, or present any evidence. The choice of the alibi defense in Iowa carries with it procedural rules consistent with the latitude allowed to the States by the due process clause.

ARGUMENT

A. Due process is not denied by suppression of evidence unless the evidence is favorable to the accused and is material either to his guilt or punishment.

The fact that a requested defense witness was held in jail during the course of petitioner's trial is undisputed. Thomas Orsucci, also known as Thomas Sanders, was imprisoned in the Polk County jail in Des Moines, Iowa, from November 15, 1934, to December 8, 1934 (A. 116-117; H.R. 18-20), and was therefore not present for the petitioner's trial in Burlington, Iowa which began on November 13, 1934, and concluded with a verdict of guilty of murder in the second degree eleven days later. (A. 91; 97). Mr. Orsucci was one of fourteen witnesses requested to be subpoenaed. (A. 92-93). For reason unknown, the service of subpoena was returned stating incorrectly: "Thomas Orsucci is in Clarinda institution for Insane." (A. 125). In 1936 or 1937, petitioner realized the error of the return when he discussed the matter with Orsucci in the penitentiary at Fort Madison, Iowa. (H.R. 34).

The basic rule relied on by the petitioner in support of his allegation of constitutional violation, is that suppression of material evidence favorable to an accused person violates due process. *Brady* v. *Maryland*, 373 U.S. 83. The respondent respectfully submits that the rule in *Brady* is not applicable because Orsucci's testimony, had it been given, would not have been material to the petitioner's guilt or punishment; it is probable that the effect of the testimony would have been harmful rather than favorable; and the petitioner has waived his right to claim suppression by his own lack of diligence.

Petitioner argues that Orsucci's testimony would have been material because of the Iowa law which allows service of subpoenas at the State's expense if the trial court

finds such witness to be "material and necessary" to the defense.[1] Adherence to the petitioner's reasoning certainly leads to easy application but it reaches far beyond the more limited scope of "material to guilt or punishment" enunciated in *Brady* v. *Maryland*, supra. While the lower courts have not viewed the issue of materiality with uniformity, it does seem clear that all evidence admitted at trial (or excluded) need not qualify as evidence material to guilt or punishment.

The recent decision in *United States* v. *Keogh*, 391 F.2d 138 (2nd Cir., 1968), provides an unusually thorough review of "suppression" case law. In the opinion, Judge Friendly distinguishes between "easy" cases where intentional prosecutorial suppression presumes the evidence to be highly material and those where suppression was not deliberate. In defense of a high standard of materiality in the latter type cases the opinion states in pertinent part at 391 F.2d 148:

> "Deliberate prosecutorial misconduct is presumably infrequent, to invalidate convictions in the few cases where this is proved, even on a fairly low showing of materiality, will have a relatively small impact on the desired finality of judgments and will deter conduct undermining the integrity of the judicial system."

While "request" cases were held in the same disrespect as intentional suppression by the prosecutor, the circum-

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1. Section 13880, Iowa Code (1931):

"Witnesses for the defense shall be subpoenaed at the expense of the county only upon the order of the court or judge thereof before which the case is pending, made upon a satisfactory showing that the witnesses are material and necessary for the defense, which order may be made at the time of the trial or other dispositions of the case. The board of supervisors shall not allow any claims for fees of witnesses not thus authorized."

This Section, now numbered 781.2, was recently amended by the legislature when the words "or judge thereof" were stricken from the first sentence. Acts 1967 (62 G.A. Ch. 400).

stances below belie the application of that reasoning to this case because there is no proof of knowledge of suppression by the County Attorney or that the Sheriff's erroneous return was any more than oversight or mistake.

In *United States* v. *Tomaiolo*, 378 F.2d 26, 28 (2nd Cir., 1967); *Link* v. *United States*, 352 F.2d 207, 212 (8th Cir., 1965); and *Coleman* v. *Maxwell*, 273 F.Supp. 275, 280 (S.D. Ohio, 1967), it may be observed that evidence used for impeachment or credibility attack is not always of constitutional magnitude. To be material to the guilt of the petitioner, Orsucci would have had to contribute to the identification of the petitioner near the scene of the crime, something he could have not have done without incriminating himself. Of course, Orsucci could have pointed out that one of the State's identification witnesses was not sure about seeing him the morning of the murder. (H.R. 48-50). But this would prove nothing regarding the petitioner's identification and in effect would have strengthened the testimony of the challenged witness by contrasting his honesty in admitting uncertainty as to one suspect and certainty to the other.

Although the defense had knowledge of what had previously occurred regarding the Orsucci's identification (H.R. 185), a vigorous attempt by counsel to impeach the state's identification witnesses was nearly void of reference to Orsucci. (T.R. 45-64; 84-95). This not only indicates the lack of importance of the subject but also raises serious doubt as to whether impeachment would have been possible had Orsucci been produced.[2]

2. The law is well settled in Iowa that the witness to be impeached must have proper foundation questions asked of him to establish the prior inconsistent statement to be challenged. This rule has been given full effect from before the petitioner's trial up to the present. *Bisgaard* v. *Duvall*, 151 N.W. 1051, 169 Iowa 711 (1915); *State* v. *Pilcher*, 158 N.W.2d 631, 636, ... Iowa ..... (1968).

The decisions by this Court in *Alcorta* v. *Texas,* 355 U.S. 28 and *Giles* v. *Maryland,* 386 U.S. 66, serve to clarify the difference between the instant case and one in which credibility testimony takes on Fourteenth Amendment protection. In *Alcorta,* the only eyewitness to the killing testified falsely, with the knowledge of the prosecutor. The gap in his credibility was in effect the difference between five years imprisonment and the death penalty for the accused. In *Giles,* the credibility of the prosecutrix was extremely important regarding the key issue of consent in a rape charge. The evidence apparently could have assisted the accused to a complete defense.

In comparison, Orsucci could have done little more than deny his own presence at the Burlington murder, a contention which, even if clearly established would not have exculpated the petitioner. It follows that the testimony desired by the defense from Orsucci cannot unequivocally be presumed to be favorable. His implication in the affair or his personal interest in exoneration could have subjected the weight of his testimony to serious doubt by the jury. A recognition of constitutional right to be free from suppression of favorable evidence is understandable. However, there would be grave cause for concern if that rule were extended to include unfavorable or questionable evidence.

No view of this alleged due process violation would be complete without a consideration of the extraordinary circumstances involved subsequent to the trial. During the years following discovery of the availability of Orsucci, at least five different attorneys represented the petitioner before Orsucci died in 1965. (A. 11, H.R. 39, 51, 52, 54). For over two years petitioner was out of prison but evidently

did not contact Orsucci. (H.R. 94). It also appears that the petitioner was able to spend $2000 obtaining the deposition of another trial witness, Clarence Ruggles, in San Bernardino, California in 1961. (A. 61-62; H.R. 56). Although Orsucci resided in Des Moines, Iowa and occasionally talked with petitioner's brother, Hal J. Johnson (H.R. 125-127), no deposition was obtained of what "pertinent" knowledge Orsucci had, although it was offered "if requested" in 1949. (A. 60). If it may be said that the affidavit represents petitioner's recognition of a right, it should be clear that the right was abandoned by waiting until after Orsucci's death to claim it. Such a conclusion would seem to be in line even with the strict Federal standard. *Johnson* v. *Zerbst,* 304 U.S. 458, 464; *Brookhart* v. *Janis,* 384 U.S. 1, 4. Indeed, the petitioner has frankly admitted before the Federal District Court, ". . . I certainly was negligent in not taking a deposition from the man." (H.R. 56).

Finally, reference to *Washington* v. *Texas,* 388 U.S. 14, reveals why the error of the subpoena return was harmless error under the concept expressed in *Chapman* v. *California,* 386 U.S. 18. In *Washington,* supra, the statute provided a one way street, allowing the State to have testimony refused to the defendant. The Iowa statute only attempts to provide such testimony in spite of indigency. The erroneous return prevented both the defense and the prosecution from securing whatever information Orsucci may have had.

B. A conviction remains valid unless the challenged evidence is proven false and it was knowingly used by the prosecution.

State's exhibits one and two in petitioner's 1934 trial were hand printed notes which may be described as being

inculpatory. (A. 126). The use of this additional evidence was strictly in accord with the governing Iowa law.[3] The notice was received six days before trial. (A. 87-90, H.R. 181-182). While the notes were received in July that year, Mr. John A. Dailey, Des Moines County Attorney in 1934, later explained that they had not been submitted to handwriting expert Vernon Faxon until September because "the county was broke" at that time during the Depression. (H.R. 165, 172). Nevertheless, Mr. Dailey made it clear at the habeas corpus hearing that he did not induce the notes to be written, they came as a surprise to him, and in his estimation "the case would have been quite adequate without them." (H.R. 173-174).

This Court has repeatedly scorned the knowing use of false evidence by the prosecution in order to obtain a conviction against an accused. *Miller* v. *Pate,* 386 U.S. 1; *Mooney* v. *Holohan,* 294 U.S. 103. What is perplexing is that petitioner attempts to apply that rule herein where (1) the prosecutor denies knowledge of any fraud, (2) the attack on the reliability of the notes combined with an instruction of the court rendered them useless, and most of all, (3) the validity of the evidence remains a subject of expert speculation.

The petitioner's argument regarding the notes plunges headlong into false evidence consideration after dismiss-

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3. Section 13851, Iowa Code (1931), now 780.10, Iowa Code (1966):

> "The county attorney, in offering the evidence in support of the indictment in the order prescribed in section 780.5, shall not be permitted to introduce any witness who was not examined before a committing magistrate or the grand jury, and the minutes of whose testimony were not presented with the indictment to the court, unless he shall have given to the defendant, or his attorney of record if the defendant be not found within the county, a notice in writing stating the name, place of residence, and occupation of such witness, and the substance of what he expects to prove by him on the trial, at least four days before the commencement of such trial."

ing them in a matter-of-fact fashion as being fraudulent. Even the respondent's habeas corpus evidence is offered as though falsity were conceded. While the analysis by the petitioner's document examiner agrees with the examination made by a state expert, there remains a vast distinction between fact and opinion. No fact concession has been made by the respondent that the notes are false and if such conclusion were stated it would be a questionable admission without direct proof. Although respondent did state below that admission of the notes was incorrect, such statement reflects only the present standard of handwriting analysis technology, not that of 1934 and not that of the future.

The jury system provides great safety from a determination of guilt or innocence by persons specially qualified in some art or science. Ordinarily, jurors, not the experts, arrive at the fact conclusion which determines imprisonment or freedom for an accused. If the jury in the petitioner's 1934 trial could be polled, the remarks would probably provide a textbook example of how an accused may be protected from questionable documentary evidence.

The defense made it quite clear to the jury that the document examiner was only expressing an opinion (T.R. 201), and that the notes may have been manufactured by another prisoner. (A. 108; R. 288). The petitioner's representation led the Federal District Court below to remark that "after reviewing the abstract of record of petitioner's trial, this court is convinced that the record indicates that petitioner's trial counsel, Mr. Doran and Mr. Finley were able, vigorous and persistent in presenting the case for defense." (A. 63).

The trial court gave further aid to the accused by instructing the jury that "while it is proper to consider such

evidence it is proper to remark that it is the lowest order of evidence, or evidence of the most unsatisfactory character."[4] Although the rule of evidence regarding handwriting in Iowa (Section 622.25, Code of Iowa 1966) has been adjusted by judicial decision to keep pace with the advancement of technology,[5] there seems to be no reason to relegate the more recent analysis to a higher plane than that granted to the 1934 opinion.

The petitioner has directed considerable argument toward the proposition that the good faith or bad faith of the prosecution is irrelevant in overturning false evidence cases just as it is in suppression decisions. While we think the complicity issue need not be reached herein without first finding the notes false, it is interesting to note the absence of reference to *Miller* v. *Pate*, 386 U.S. 1, in that argument. *Miller* recently restated the rule which had been articulated by this Court as early as 1935, only a

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4. Instruction 17 stated in its entirety:

"Our statute provides that evidence respecting handwriting may be given by experts by comparison, or by comparison by the jury with writing of the same person which are proved to be genuine. Evidence of this character has been introduced upon this trial, and it is proper for the jury to carefully consider the testimony of the witness and to say how much weight shall be given to such testimony, taking into consideration the amount of experience, knowledge and skill possessed by the witness about the matter concerning which his opinion has been given. But, while it is proper to consider such evidence, it is proper to remark that it is the lowest order of evidence, or evidence of the most unsatisfactory character. However upon this question you will compare the writings in dispute with writing of the defendant which you may find proved to be genuine, and in considering this question and doing this you may and should use your own judgment, from comparison of such writing, with the writings in controversy in determining whether or not the defendant actually wrote such alleged writings; and it is your duty and privilege to give your own comparison and knowledge gained from such comparison such weight as you think it entitled to, in connection with the other evidence admitted upon the trial upon this question." (A. 62, T.R. 375-376)

5. A comprehensive review of attitude by the Iowa Courts regarding expert handwriting testimony over the years may be found in *Cousin* v. *Cousin*, 192 F.2d 377 (8th Cir., 1951).

few weeks after the petitioner's trial. *Mooney* v. *Holohan*, 294 U.S. 103. In *Mooney* and *Miller* the rule against use of false evidence is clearly restricted to "knowing" use by the prosecution. Even if a reasonable interpretation includes agents of the state not directly involved in the trial, the record below is silent regarding any agent of the State having knowledge of the purported falsity of the notes, except for that testimony which was also before the jury. (A. 108; T.R. 309). The County Attorney's presentation of the notes to the jury after first notifying the defendant was a disclosure obviously founded in good faith and fairness. Indeed, if the notes had not been subjected to the scrutiny of the jury, a good argument might reason that such an omission was suppression of evidence violative of due process because their effect might have proven to be crucial to the result of the trial. *Brady* v. *Maryland*, 373 U.S. 83; *Giles* v. *Maryland*, 386 U.S. 66.

C. An instruction by the trial court which creates an inferior burden of proof on an accused choosing the special defense of alibi does not alter the overriding presumption of innocence.

According to the very recent decision in *Stump* v. *Bennett*, ... F.2d ....., (8th Cir., 1968) filed June 27, 1968, the Iowa rules on alibi evidence are unconstitutional. This leaves three basic positions in conflict.

The first contention is expressed by the majority in the *Stump* case, supra, and the minority in the Iowa Supreme Court decision in *State* v. *Stump*, 254 Iowa 1181, 119 N.W.2d 210. In essence, their arguments parallel those of the petitioner herein that an instruction requiring a defendant to assume a burden of proof strikes at the guarantee of presumption of innocence granted by the Constitution.

Another view is represented by the decision below, *Johnson* v. *Bennett*, 386 F.2d 677 (8th Cir., 1968) and the dissent in *Stump* v. *Bennett*, supra. Briefly, the argument states that the alibi instruction is confusing, unnecessary, and unwise but does not represent a violation of constitutional rights.

The third conclusion regarding the Iowa alibi process is included in the majority rulings by the Iowa Supreme Court in *State* v. *Stump*, supra, and *State* v. *Johnson*, 221 Iowa 8, 264 N.W.2d 596. Basically, the reasoning of the court is that alibi represents a special kind of defense on which the State of Iowa may place certain safeguards for the protection of the innocent without making it impossible to convict the guilty. Respondent is persuaded that the long established position of the Iowa Supreme Court represents the most reasonable argument.

The adoption of the majority opinion in the *Stump* decision strikes at the very heart of the jury system and the right of a state to prescribe rules of criminal procedure. It is generally recognized that the necessity for an instruction largely depends on the facts of the case so that each jury may be advised as to the crucial issues. The dissent by Chief Judge Van Oosterhout noted:

> "The Supreme Court, this court and other courts have uniformly held that fragments of instructions should not be considered in isolation but that instructions should fairly be considered as a whole and such principle governs in cases where violations of constitutional rights are asserted. *United States* v. *Gainey*, 380 U.S. 63, 70-71; *Leland* v. *Oregon*, 343 U.S. 790, 795, 800; *McIntosh* v. *United States*, 8 Cir., 341 F.2d 448, 456; *Harding* v. *United States*, 8 Cir., 337 F.2d 254, 257; *Hayes* v. *United States*, 8 Cir., 329 F.2d 209, 218; *Stoneking* v. *United States*, 8 Cir., 232 F.2d 385, 389; *United States* v. *Andreadis*, 2 Cir., 366 F.2d 423, 434; *United States* v. *Senior*, 7 Cir., 274 F.2d 613, 616-17. See 23 A C.J.S. Criminal Law §1321 (1). (2)."

If instructions are to be considered piecemeal against the weight of the authorities, why should the alibi instruction take a special position beyond the scope of the general rule? The presumption that the alibi instruction rises above the others to the prejudice of a defendant ignores reality. As succinctly noted by the separate dissent of Judge Matthes in *Stump* v. *Bennett*:

> "In examining the trial court's comprehensive instructions, I find that the jury was informed on at least twelve different occasions that it was required to determine beyond a reasonable doubt that defendant had committed the offense before it could find him guilty. In this posture, it is inconceivable to me that the defendant was deprived of the presumption of innocence by reason of the alibi instruction. I believe that the jury, presumptively composed of reasonably intelligent persons, understood that all essential elements of the offense had to be established beyond a reasonable doubt. For this reason I am unable to comprehend any rational basis upon which to interfere with the judgment of the state court in this post-conviction proceeding."

The jury below was also informed by several instructions, including the challenged one, that reasonable doubt as to guilt demanded acquittal. (A. 95-96; T.R. 368-381). The evil in overparticularizing review of instructions is that any instruction may be faulty standing alone just as any remark taken out of context may lead to misinterpretation. The alibi instruction does not deserve such special treatment.

The pitfall which beckons those who argue against the wisdom of the alibi instruction is created in part by disregard of the supporting instructions but also an apparent lack of faith in the jurors. Nevertheless, the wisdom of the rule should not occupy a position of importance when con-

sidering the possible violation of constitutional rights any more than the fact that such practice is not followed in most jurisdictions. *Leland* v. *Oregon,* 343 U.S. 790.

Thus, even the intermediate position taken by the minority in *Stump* v. *Bennett,* supra, that the alibi instruction is useless but not unconstitutional makes a value judgment which should be reserved to the state. The Iowa majority notes in the petitioner's direct appeal that "The instructions in this case in regard to the alibi did not go as far as such instructions many times rightfully go." *State* v. *Johnson,* 221 Iowa 8, 20, 264 N.W. 596. If a special distrust of alibi evidence prevails in Iowa, then the procedure used for advising the jury of the fact should not be smothered, regardless of the severity of the standard; unless the presumption of innocence is truly lost.[6]

Much misunderstanding is spread by use of the phrase "shifting the burden." As a basis for finding constitutional violation this is especially unfortunate because it contains a large amount of opinion and no foundation in fact. The burden on the state to prove guilt, if at all, beyond a reasonable doubt, is drummed into the jurors by repeated reference to it in the instructions. Nowhere in the instructions, including the alibi instruction, is the jury told that that overwhelming concept budges, not to mention "shifts." The separate and inferior burden does not shift from anywhere. It arises by the choice of the defendant when he attempts to show he was present in some particular place, rather than rely on the presumption he was anywhere but the place of the crime. If that burden is not reached, the accused falls no further than he himself has climbed. The

6. The United States Supreme Court has often compared the interest of a state and the rights of a defendant in resolving other issues. *Leland* v. *Oregon,* supra; *Giles* v. *Maryland,* 386 U.S. 66; *Chapman* v. *California,* 386 U.S. 18; *Spencer* v. *Texas,* 385 U.S. 554. A critical review of other decisions may be found in *Hyder* v. *Beto,* 270 F.Supp. 46, 50 (N.D. Tex., 1967).

safety net of presumption of innocence is never moved. Again, as in *Leland* v. *Oregon*, 343 U.S. 790, 800, the jury system must be defended from an attempt to degrade its function based on an assumption of inability.

While the reasoning above would seem to be equally applicable to Iowa's procedure and those states with other standards regarding alibi,[7] the opinion in *Stump* v. *Bennett*, raises two further reasons why constitutional error may not be found herein. First, the trial occurred in 1934, and second there was no preservation of constitutional error.

Counsel for petitioner showed a vigor in his trial defense seldom observed in modern practice. Their competence is unquestioned. (H.R. 74). Yet, regardless of their great ability, they could not foresee the constitutional opportunities available in another era. Consequently, the failure to take any exception to the sixteenth instruction both lends weight to a conclusion that no such right existed at that time and that the right is now foreclosed.[8] The

7. The Court of Appeals, 8th Circuit, noted in *Stump* v. *Bennett* that Georgia has a rule similar to Iowa's, and Idaho, West Virginia, Arkansas, Montana, California, and Texas permit "instructions which require a defendant to present sufficient evidence of alibi to establish in the minds of the jurors a reasonable doubt of his guilt but do not at any time shift the burden of persuasion . . . *these states simply shift to the defendant the burden of going forward with the evidence as to the alibi itself.*" (Emphasis ours).

8. Footnote 9 in *Schmerber* v. *California*, 384 U.S. 757, 765, includes the dicta: "Since trial here was conducted after our decision in *Malloy* v. *Hogan*, supra, making those principles applicable to the States, we think petitioner's contention is foreclosed by his failure to object on this ground to the prosecutor's question and statements."

Petitioner's Exception XIII read:

"Defendant excepts to Instruction XVI for the reason that the same does not correctly state the law with reference to the defense of alibi, and the manner and form in which the same was prepared by inference sets out the feeling of the drawer of the instruction (perhaps unconsciously so) that

majority opinion by the Court of Appeals in *Stump* v. *Bennett* has built a very strong argument for finding the right to presumption of innocence existed long before the petitioner's 1934 trial. Included in support of that position are two decisions by this Court, *Coffin* v. *United States,* 156 U.S. 432, 453 (1895) and *Cummings* v. *Missouri,* 4 Wall. 277, 328 (1866). If it may be agreed that the right to presumption of innocence was available in 1934, it follows that the failure to challenge the alibi instruction on that ground should be given serious consideration.

On the other hand, if the applicable constitutional rule has been announced since 1934, e.g. *Morrison* v. *California,* 291 U.S. 82 (1934); *Speiser* v. *Randall,* 357 U.S. 513, 525-26 (1958); then the question arises as to whether the petitioner is entitled to retroactive application of such rule. After consideration of several decisions by this Court, the Court of Appeals apparently adopted the reasoning in *Johnson* v. *New Jersey,* 384 U.S. 719, and *Tehan* v. *Shott,* 382 U.S. 406, in concluding that retroactive application of recently adopted rules would not be available to the petitioner. (A. 82).

Aside from the numerous authorities cited by the petitioner in support of his contention, it is argued that the alibi instruction issue is an original question of constitutional importance. If this is so, then there can be no argument regarding the application of a "new" rule to a chance beneficiary under the principles of *Stovall* v. *Denno,* 388 U.S. 293.

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the evidence of alibi in this case was rather thin and entitled to little weight,—this because of the Court's wording, 'and you are also instructed that you scan the proof of alibi with care and caution, and all of the evidence upon this point both for and against this claim of alibi, should be scrutinized with care and carefully considered by the jury'." (T.R. 395).

Finally, the general issue of whether the alibi instruction may be harmless error according to *Chapman* v. *California,* 386 U.S. 18, cannot be ignored. There is little room to argue that the loss of presumption of innocence could be insignificant. However, if the "error" involved is merely a label attached to the alibi instruction expressing dissatisfaction with its wisdom or wording, then there can be no doubt that it is not an error of Constitutional magnitude. *Chapman* v. *California,* 386 U.S. 18, 24.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be affirmed.

RICHARD C. TURNER
Attorney General of Iowa
WILLIAM A. CLAERHOUT
Assistant Attorney General
State House
Des Moines, Iowa
Attorneys for Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 32

GALE H. JOHNSON,

Petitioner,

vs.

JOHN E. BENNETT, WARDEN, IOWA STATE PENITENTIARY,

Respondent.

REPLY BRIEF FOR PETITIONER.

RONALD L. CARLSON,
Iowa City, Iowa,
Counsel for Petitioner.

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ARGUMENT.

A. THE PROSECUTION'S SUPPRESSION OF MATERIAL EVIDENCE AND EMPLOYMENT AT TRIAL OF FALSE DOCUMENTS DEPRIVED PETITIONER'S CONVICTION OF ITS DUE PROCESS BASE.

There is no dispute in this case over the fact that a requested defense witness was held in jail during the term of petitioner's trial. With appreciated candor the respondent so states in the opening sentence of respondent's argument (Resp. br. 7). No explanation is proffered for the state's incarceration and subsequent deception with respect to the witness (Resp. br. 7; A. 77). Respondent urges, however, that this incredible conduct by the state

should not be considered violative of the petitioner's constitutional rights. In taking this position, respondent first points out that where suppression of evidence is deliberate the courts readily overturn the conviction and do not tarry to weigh the materiality of the suppressed evidence (Resp. br. 8, citing *United States* v. *Keogh,* 391 F. 2d 138, 148). But, urges the respondent, the instant cause is not one of this class of cases because of lack of proof that the prosecutor himself participated with the sheriff in the suppression. The argument overlooks the point that deliberate suppression of evidence opprobrious to the due process clause may be perpetrated either by the prosecutor or other law enforcement officials.

This principle was carefully set forth in petitioner's brief on the merits (Pet. br. 10-11), citing *Barbee* v. *Warden, Maryland Penitentiary,* 331 F. 2d 842. To this reasoning respondent made no reply except to repeat the assertion that absent proof of knowledge or intrigue by the prosecutor himself, there is no constitutionally cognizable suppression. This view overlooks the consistent line of cases which condemn suppression by the prosecutor or other law enforcement officials. As stated in *Barbee,* "The police are also part of the prosecution. . . ." 331 F. 2d at 846. Could it be seriously contended that a confession might be brutalized from an accused by sheriff's deputies either in the county of trial or another, and because the prosecutor trying the case did not assist in the brutality the confession is admissible? The guiding principles in the suppression area are well stated in Levy, *Justice—After Trial,* 11 N. Y. L. For. 240, 292 (1965):

> The courts have never made any distinction between whether the prosecution or the police knew the facts that proved the perjury or suppression; it being held that the prosecution is charged with knowledge which it should have known. That police action in suppressing is state action violative of due process would also

> seem apparent since the prohibitions of the due process clause are addressed to the state: it thus makes no difference which agency of the state violated due process; and because acts of police officers may violate the Constitution, while the Constitution protects only against state action. Constitutional responsibilities may not be avoided by carving out small units.

See *People* v. *Robertson,* 190 N. E. 2d 19, 21 (N. Y. Ct. App. 1963); *Evans* v. *Kropp,* 254 F. Supp. 218, 220-21; *Luna* v. *Beto,* 391 F. 2d 329, 332; Shadoan, Trial Tactics, 21, 29 (Trial Lawyers Serv. Co., 1966).

If, as suggested by the respondent as well as significant case authority, materiality of the suppressed evidence is presumed where there has been a deliberate concealment, the instant case would appear to fit within the rule. The Federal District Court below discovered that the imprisoned witness had never been in the mental institution wherein the authorities represented him to be (A. 34). It appears conceded that the requested witness was under lock and key of the very sheriff's office which promulgated the misrepresentation. The Court of Appeals below stated that the evidence on the point established a prima facie case that the sheriff's return was false (A. 77). If the respondent wished to avoid the conclusion that intentional suppression occurred, explanatory evidence should have been produced. The record appears barren of any such explanatory proof, and the state in its brief indicates that it is unaware of the reason that the false statement appeared on the subpoena return (Resp. br. 7). These circumstances present a fact situation wherein our courts have invalidated convictions without major inquiry as to the materiality of the suppressed evidence. *United States* v. *Keogh,* 391 F. 2d 138, 147-48; Note, 81 Harv. L. Rev. 1260, 1273-75 (1968). The high purpose to be served by such an invalidation rule is found in the need for and salu-

tary desire of our legal system to protect the integrity of the judicial process.[1]

While the instant case appears to merit invocation of the above principles, petitioner in no way implies by urging the point that the requested witness was non-material. Indeed, Thomas Orsucci occupied a central role in the events which took place in 1934. There is evidence that the authorities announced in advance of trial that Orsucci was with the petitioner in a nearby "beer tavern" the night prior to the offense (A. 133). Further, evidence indicates that one of the two key state witnesses near the scene of the offense made an identification of Orsucci. The identification appears to have been made with sufficient certitude to result in Orsucci's arrest for murder (A. 133). He was held on this charge for some five weeks. Ultimately, the authorities apparently satisfied themselves that the identification was incorrect (A. 134).[2] Among other matters, Orsucci's recounting at trial of the erroneous identification made by a state witness whose credibility was absolutely crucial to the prosecution would be highly relevant in the jury's assessment of such witness' credibility. In *Napue* v. *Illinois*, 360 U. S. 264, 269, this court indicated that credibility may well be the critical factor in a given case. "The

1. *United States* v. *Keogh*, cited above, discusses both deliberate suppression cases and those wherein the defendant requested specified evidence. The decision indicates that the request cases stand upon "special footing," the fact of the request being accorded peculiar weight. Failure to appreciate the use to which the defense could put the evidence is no excuse, and convictions obtained where an appropriate defense request has not been honored should be invalidated even on a fairly low showing of materiality.

2. Appendix page 133 above cited refers to matter in Pet. Ex. 20, H. R. 157; Appendix page 134 cited above refers to matter in Pet. Ex. 23, H. R. 158. Petitioner notes a reproduction error in connection with Pet. Ex. 23 at A. 134. Line four at that page correctly reads "... have checked his story ..." and not "history" as printed in the appendix.

jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. . . ." In *Giles* v. *Maryland,* 386 U. S. 66, 70 the court made the point again. "The credibility of the witnesses was thus important to the outcome of the case."

Where a case requires appraisal of the materiality of the suppressed evidence, various relevant suggestions appear in *Giles* to determine the dimensions of the suppression. In the opinion written by Mr. Justice Harlan, he points out that the standard in certain Supreme Court cases has been whether the testimony may have had an effect on the outcome of the trial. 386 U. S. at 116. The evidence here may well have had just such an effect.[3] Mr. Justice Fortas pointed out that no respectable interest of the state is served by its concealment of information which is material, generously conceived, to the case. 386 U. S. at 98. Under either view the evidence here appears material. This conclusion is supported by the trial court's issuance of a subpoena order for the requested witness (A. 94). As indicated previously by petitioner (Pet. br. 12-13), Iowa law required the trial judge to be satisfied that such witness was "material and necessary" prior to authorizing a defense subpoena at state expense.

The respondent recognized such fact, but suggests with-

3. Arrayed against the two state witnesses were several defense witnesses who placed the petitioner 165 miles from the scene of the offense at or near the time of its commission (see, *e.g.*, A. 103, 105). In these circumstances, the reliability of each of the state's witnesses was important, and prior observational errors on key matters were extremely relevant. Mr. Justice Harlan stated in *Giles* that the charges there were convincingly proved. It is perhaps well to point out that the record here discloses no evidence of a confession having ever been obtained by the police, and the available newspaper accounts of the period indicate affirmatively to the contrary on this point. While he did not take the stand at his original trial, Mr. Johnson's claim of not guilty appears to have been consistently maintained from his plea in the 1934 prosecution through his emphatic statements in the present proceeding (Federal District Court Habeas Corpus transcript 87).

out citation to authority that the definition of "material" as utilized by this court in *Brady* v. *Maryland*, 373 U. S. 83, is considerably more limited than the Iowa statute contemplated (Resp. br. 8). The history of this statute demonstrates that its purpose was to prevent the summoning of witnesses whose testimony was not necessary in the trial of the case. *Wheelock* v. *Madison County*, 75 Iowa 147, 39 N. W. 243 (1888); *Jones County* v. *Linn County*, 68 Iowa 63, 65, 25 N. W. 930, 931 (1885).[4] It thus appears that the Iowa statute at the time of petitioner's trial imposed a more stringent standard respecting materiality than that contemplated in *Brady* v. *Maryland*. Indeed, the witness must have been "necessary" to the trial of the case in order to be subpoenaed under the statute. Respondent's present arguments should have been addressed to the trial court in 1934 prior to issuance of the subpoena if the state wished to contest the need for Orsucci's testimony. No such challenge appears in the record.

Although the petitioner has touched upon the issue of materiality at some length, it should be kept in mind that this is not a case of a prosecutor who simply overlooked a matter in his briefcase which was potentially helpful to the defense. The instant cause presents a defendant who specifically requested an available witness, and whose request was approved by the court. The false return by the sheriff's office in these circumstances poses a case of suppression wherein the materiality of the sought evidence moves to a position of secondary importance and the integrity of the judicial process occupies center stage. In these instances the courts have promptly granted relief, refusing to countenance official acts which collide with fun-

4. As stated in the *Wheelock* case, the intention of the statute was that the county was to be liable for the fees of such witnesses only as should be material to the defense, and the question of materiality was to be determined by the order of the court directing that the subpoenas issue.

damental notions of decency and fairness. Due process of law has long required that ". . . States in their prosecutions respect certain decencies of civilized conduct." *Rochin* v. *California*, 342 U. S. 165, 173.[5]

Two final points raised by respondent require brief mention. First, respondent asserts lack of diligence by the petitioner in failing to preserve Orsucci's testimony by way of deposition prior to Orsucci's death. This assertion overlooks the prisoner's numerous frustrated attempts to obtain habeas corpus hearings to spread Orsucci's testimony on the record, many of these efforts occurring prior to the demise of the witness in 1965 (A. 9-10, 25). The record demonstrates that the prisoner tried in every way he knew how to bring the matter on for hearing. To urge that the petitioner be penalized for any alleged failures to produce Orsucci's testimony appears especially unseemly in view of the state's consistent resistance to providing a hearing on these claims (see, *e.g.*, A. 23).

Respondent pointed to the fact that during the cross-examination of the state's two key trial witnesses, little was made of the earlier identification of Orsucci by one of these witnesses (Resp. br. 9). At this time it is difficult to condemn petitioner's trial attorneys for their failure to explore the area more fully when it is remembered that they had been erroneously informed that the leading defense witness on the point was unavailable for trial. Denials

5. Mr. Justice Fortas, in *Giles* v. *Maryland*, 386 U. S. 66, 101, points out that a supportable conviction "requires something more than that the state did not lie." In view of the record here (see A. 77), petitioner's conviction does not appear free even from that minimal infirmity. Respondent now suggests that the sheriff's erroneous return may have been the product of oversight. Petitioner points out that such contention does not save the respondent. See *Ingram* v. *Peyton*, 367 F. 2d 933, 936 (invalidating 18 year-old conviction); *Levin* v. *Katzenbach*, 363 F. 2d 287, 290 (collecting numerous cases); *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 570; Levy, *Justice—After Trial*, 11 N. Y. L. For. 240, 293 (1965).

of the faulty identification by the involved state witness would have stood virtually uncontradicted without Orsucci to back up the defense position. Doubtless the trial strategy would have been altered with Mr. Orsucci present.[6] The point is that the accused was forced to trial without a witness he was rightfully due. All of the objections raised by the respondent could have been resolved had the state simply done the right thing and produced the witness as requested, and as ordered by the trial court. Exactly what Orsucci would have said, the effect of his evidence on the credibility of the state's witnesses, the impact of his testimony upon the jury—all of these questions would have been amply answered had defendant's right to secure witnesses been protected by the state. The subversion of this right, one critical to the defense in a judicial system premised on the adversary concept,[7] resulted in the situation presented in this case. The respondent now attempts to use the state's prior wrongdoing as a sword, urging that the burdens flowing from suppression of the witness' testimony fall upon the shoulders of the defendant instead of its rightful place, the party which was responsible for this situation. As concluded by Judge Friendly in *United States* v. *Keogh*, 391 F. 2d 138, 147, appropriate defense requests for available evidence are entitled to "peculiar

6. On the general admissibility of impeaching evidence in criminal cases, see 3 Wharton, Criminal Evidence § 903 (12th ed. 1955) ("Generally, any fact or circumstance tending in the least to discredit a witness is admissible to impeach him, and a party, especially the accused, is entitled to all the evidence in a case legitimately bearing upon the question of the veracity of a witness of the opposite party."); 98 C. J. S. Witnesses § 460, page 323 (Anything having a tendency "to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.").

7. Comment, 51 Iowa L. Rev. 714-15 (1966). Should the procedure in this case seem fair to the respondent, petitioner ponders how the state would react if the accused were permitted to review the list of proposed state witnesses, then select a witness from the list and lock him up for the duration of the trial.

weight." After pointing out that *Brady* v. *Maryland* had eliminated the issue of good faith when a suitable request has been made, the opinion stated:

> The request cases also stand on a special footing; the prosecution knows of the defense's interest and, if it failed to honor this even in good faith, it has only itself to blame. 138 F. 2d at 148.

Petitioner urges that false documents were employed in the prosecution's effort to secure his conviction. The Court of Appeals below ruled that a conviction based upon false evidence could not be overturned except where proof demonstrated that the prosecutor knew the evidence was false at the time of trial (A. 75). Petitioner's brief on the merits cited significant case authority which reflected the inaccuracy of the court's conclusion in this regard (Pet. br. 15-17), and the respondent does not appear to defend this view expressed by the Court of Appeals. Rather, the respondent attacks petitioner's basic premise that the involved documents were false. Apparently the respondent relies upon the old trial evidence to the effect that the petitioner wrote the subject instruments. The position is remarkable in view of the respondent's previous admission that it was error for the state to introduce the documents (A. 56).[8] Respondent now urges that this prior admission was improper for respondent to make because it was not supported by proof (Resp. br. 13). The last statement seems unusual because of the analysis of the challenged documents accomplished by the state's own handwriting expert in 1966, fully a part of the record in this case (Resp. Ex. 2, A. 128; H. R. 197). This evidence alone would provide ample support for the admission of error contained in respondent's trial brief. But further, a leading au-

8. In addition, respondent referred to the challenged documents as "the questionable notes" in the Court of Appeals below. Resp. br. 10, U. S. Ct. of Appeals.

thority on the subject has stated unequivocally that in his opinion the petitioner did not author the inculpatory notes introduced by the prosecution as state's exhibits 1 and 2 at the 1934 trial.[9]

The two felons who produced the "questionable notes" for the state also testified to hearing the petitioner admit his guilt of the offense charged to a third prisoner (A. 89). This testimony was sharply challenged by the third prisoner (A. 106-7), as well as prison officials who testified on behalf of the defense that Gale Johnson was under guard at all times prior to trial, and the guards were given strict orders to permit no conversation with him (T. R. 260-61, 264, 270-71). An affidavit of the prisoner's guard supports the position that no such conversation took place (Pet. Ex. 8, H. R. 83-84). Petitioner urges that recent evidence demonstrates beyond serious question the falsity of the challenged notes. Had this information been available at trial, not only would the notes have been destroyed as effective evidence for the state, but the fact that forgeries had been prepared would have reflected adversely on the whole of the testimony provided by the two producing felons. Well-reasoned authority indicates that where the prosecutor has cause to believe that evidence may be false, he should make available to the defense the means to discover the falsity. Further, where evidence of the magnitude of the documents introduced here is later demonstrated to be false, reason indicates that unfairness occurred in the

9. Professor Winsor C. Moore, who testified to this effect at petitioner's habeas corpus trial, has written widely in the field of document examination. A partial list of his publications includes *Testimony of the Expert Document Examiner,* 22 U. Pitt. L. Rev. 675 (1961); *Cross Examining the Incompetent Document Examiner,* 1 Washburn L. J. 533 (1963); *Suspicious Documents,* 6 Prac. Lawyer, v. 1, p. 39 (1960); *Anonymous Writing: Methods Used to Evade Identity,* 13 Neb. B. J. 5 (1964); *Age Determination of a Document,* 14 Neb. B. J. 118 (1965); *The Questioned Typewritten Document,* 43 Minn. L. Rev. 727 (1959).

trial of the accused.[10] Relying upon *Jones* v. *Commonwealth,* 97 F. 2d 335, a Federal court in *United States* v. *Ragen,* 86 F. Supp. 382, freed a prisoner 25 years after his original conviction, and summarized as follows:

> The facts in this case present a situation almost identical with that before the court in the case of *Jones* v. *Commonwealth of Kentucky,* 6 Cir., 97 F. 2d 335. In both cases, petitioners were convicted and have served a substantial portion of their lives in the penitentiary. In both cases the perjury at the trial was first discovered by the convicted persons many years after the trial. In both cases the perjured testimony was vital to the prosecution's case. . . . In a case of this nature one would not expect to find direct proof of the connivance of the prosecution in the use of perjured testimony, and the circumstantial evidence presented is as strong as could reasonably be expected. However, even if this evidence of knowing use of perjured testimony was not in the case, I believe that even on the authority of the *Jones* case, this petitioner should be discharged. 86 F. Supp. at 390.

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10. See *McMullen* v. *Maxwell,* 209 N. E. 2d 449, in connection with trial testimony in the 1934 trial transcript record 285, 302, 311; *Luna* v. *Beto,* 391 F. 2d 329; Annotation, 7 A. L. R. 3rd 8, 32.

Perhaps it is not entirely surprising that such notes were created. The record contains testimony respecting offered pecuniary inducements to those who were willing to assist the state (A. 107, 109-110). Respondent seems to challenge the petitioner to bring the instant case within the "knowing use of false evidence" rule of *Miller* v. *Pate,* 386 U. S. 1 (Resp. br. 14). While it is not necessary to do so in order to invalidate the instant conviction, it is noteworthy here that *Miller* v. *Pate* expresses one facet of a broad and wise principle, the historic concept that the prosecutor's primary duty is not to convict but to see that justice is done. The Supreme Court explained many years ago in *Berger* v. *United States,* 295 U. S. 78, 88, that it is a prosecutor's duty to refrain from any improper methods calculated to produce a wrongful conviction. See also Everett, *Discovery in Criminal Cases,* 1964 Duke L. J. 477, 511 (1964). If, as the prosecutor's statement in closing argument seems to suggest, the state made the money offer charged by a defense witness (A. 110), activity which is antagonistic to the principles of *Berger* may be indicated.

Finally, respondent suggests that the state may have been obliged to introduce the false notes in order to avoid the error of suppressing evidence (Resp. br. 15). The dichotomy in reasoning posed here is strange. Respondent suggests that a due process violation may be committed when evidence unknown to and unrequested by the accused is not disclosed, yet earlier in the same brief asserted that no such violation occurred when the state suppressed an available witness specifically requested by the accused.

B. PLACING THE BURDEN OF PROOF ON THE ACCUSED RESPECTING A MAJOR ISSUE IN A CRIMINAL CASE IS ANTAGONISTIC TO BASIC CONSTITUTIONAL PRECEPTS.

Both the District Court and the Court of Appeals below found that the burden of persuasion with respect to whether the defendant was absent from the scene at the time of the offense was placed upon the defendant at his trial (A. 42, 79). Inasmuch as the accused had presented proof that he was absent from the scene, the Iowa trial court directed the jury that it was incumbent upon the defendant to prove such fact in order to prevail on this proof (see instruction, A. 94). The findings by the District Court and Court of Appeals below that the burden of proof on the central issue of alibi was thus placed upon the defendant is not at variance with the view of the Iowa Supreme Court in assessing the effect of such an instruction. See *State* v. *Johnson*, 221 Iowa 8, 20, 264 N. W. 596, 602 (1936); *State* v. *LaMar*, 151 N. W. 2d 496, 504 (1967).[11] Respondent

11. The impropriety of placing the burden of proof on the defendant, as the trial court's instruction in this case clearly did, is well set forth by Justice Schaefer in *People* v. *Pearson*, 169 N. E. 2d 252, 255:

> Logically, proof of an alibi is not proof of an affirmative defense because in order to establish its case the prosecution must show that the defendant was present at the scene of the crime, and evidence that the defendant was elsewhere is

does not appear to contest the above findings respecting the thrust of the challenged instruction, and agrees that the burden of proof was placed on the accused. However, respondent refers to this as an "inferior" burden (Resp. br. 15). While the petitioner fails to see how forcing him to carry the burden of persuasion on a central issue in the case saddles him only with an "inferior" burden, it does appear that the issue is narrowed for decision: does a jury charge which requires the accused to prove his non-presence at the scene in order to be acquitted under his claim of non-presence violate any concept of criminal justice? Petitioner contends that the procedure revealed here did precisely that. Well-reasoned authority set forth in petitioner's original brief articulated the manner in which such a jury charge collides with the presumption of innocence and the rule of reasonable doubt, landmark principles in the administration of our criminal law (Pet. br. 19-20).

To these cases respondent made no direct reply, and it is noteworthy that respondent cites to no decision outside of Iowa which adjudicates that such an instruction is constitutionally proper. In fact, all of the cases which the petitioner has discovered treating the alibi issue in a constitutional context strike down such a jury charge. In addition to the authorities previously cited on this point, there should be added the recent case of *Stump* v. *Bennett*, 398 F. 2d 111. This decision comprises a virtual hornbook of relevant authority in the field of the alibi charge. In *Stump* the en banc court invalidated a murder conviction on the basis that the Iowa trial court's instruction cast the burden of proof respecting alibi on the accused, that case

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only one method of negativing the prosecution's case. So where an instruction has unequivocally placed upon a defendant the burden of establishing an alibi, the conviction has been reversed.

involving an instruction which was less detrimental to the accused than the instruction in the present case. See 398 F. 2d at 126. The Court in *Stump* observed that Iowa was one of only two states which now requires a defendant to assume the burden of persuasion by a preponderance of the evidence in establishing alibi. The court indicated the result of this procedure with respect to the defendant's presumption of innocence:

> Upon a plea of alibi, the presumption of innocence is permanently shattered as to the evidence relating to (1) the presence of the defendant, (2) the time, and (3) the place of the crime itself. In *Glover* v. *United States,* 147 F. at 431, this court pointed out that proof of alibi is a denial of the essential elements of the crime. 398 F. 2d at 116.
>
> . . . [W]hen the burden of persuasion is shifted to the defendant to disprove essential elements of a crime, as it was in the instant case, then it is certain that the due process clause of the Fourteenth Amendment has been violated. F. 2d at 118.

Petitioner previously called attention to the anomalous situation which occurs when the accused produces witnesses to establish alibi, as contrasted to the case where this is not done (Pet. br. 21).[12] The Court of Appeals in *Stump* v. *Bennett* saw in this situation a further constitutional defect:

> Beyond violating petitioner's right to have the state assume the burden to prove (beyond a reasonable doubt) his presence at the crime, we think the Iowa instruction and its judicial application is patently offensive in other ways to the defendant's basic constitutional rights. Under the Iowa rule, a defendant pleading alibi faces an anomalous situation. If he does

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12. ". . . it is only when defendant elects to go farther and call witnesses to support his alibi contention that he assumes a burden, *i.e.,* to establish his affirmative allegation or defense." *State* v. *Post,* 123 N. W. 2d 11, 19 (Iowa 1963).

not plead and offer witnesses to corroborate the defense of alibi, the burden of proof never shifts to him and he may rely upon the state's failure to establish his identity and presence beyond a reasonable doubt. . . . It is only when the defendant seeks to produce witnesses to corroborate his non-presence that the Iowa rule incongruously penalizes him with the burden of persuasion as to his non-presence. . . . He must choose between the exercise of two constitutionally guaranteed rights. He must surrender either the right to offer corroborative evidence of his innocence or else his traditional right to have the state assume the burden of proving his guilt beyond a reasonable doubt. Under the Iowa rule he cannot have both. Such a procedure can have no other purpose than to "chill the assertion of constitutional rights by penalizing those who choose to exercise them. . . ." This is an impermissible burden. 398 F. 2d at 120.

The court points to the arbitrary distinction made between accused persons who present witnesses to testify that the accused was absent from the scene of the crime, and defendants who do not. The former are penalized by the requirement that their proof on the point preponderate in order to prevail:

> The Iowa rule offers different procedural protection to those individuals pleading alibi who (1) are unable to produce witnesses to verify their defense or (2) who perhaps may be more willing to forego the production of witnesses to avoid incurring the burden of persuasion as to their innocence. To shift the burden because a particular defendant offering the identical defense happens to be able to present corroborating witnesses, is basically so unreasonable we deem it a patent denial of the equal protection of the laws under the Fourteenth Amendment. There can be no logical rationale behind such an arbitrary distinction. Although on its face the rule may be deemed one of evidence in which a state's procedure is to be given great deference (cf., *Salsburg* v. *Maryland*, 346 U. S. 545 (1954)), neverthe-

> less the denial of rights justified only as a penalty assessed to a defendant calling witnesses to testify on his behalf cannot be deemed a reasonable justification for the rule. 398 F. 2d at 121.

Respondent suggests that other instructions given by the trial court in *State* v. *Johnson* cured any error by that court in delivering the challenged alibi instruction to the jury.[13] Certain other instructions in the case are set forth in the Appendix (A. 95-96). The respondent's proposition overlooks the confusion as to burden of proof created by giving the special alibi instruction, a point made in petitioner's original brief and decisively referred to in the important case of *Glover* v. *United States*, 147 Fed. 426, 433 (Pet. br. 19). A Colorado decision said it well in dealing with the subject point. Deciding that prejudicial error occurred when the defendant was required to prove alibi, the court ruled that an erroneous jury instruction in a criminal case cannot be corrected by another instruction which states the law accurately "unless the erroneous one be plainly withdrawn." *McNamara* v. *People*, 48 Pac. 541, 544 (1897). Respondent intimates that even if the challenged instruction here penalized the defendant for calling witnesses in his behalf, the point of the instruction was lost on the jury because of the other instructional emphasis on presumption of innocence and reasonable doubt. But if the alibi instruction was so unimportant, why did the prosecutor select it alone from this group of instructions to press home to the jury in final argument (A. 113-14)?

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13. *Stump* v. *Bennett* was resolved by a 5-3 decision in the Court of Appeals. In urging the above argument, respondent presses a point made by the dissenting judges in *Stump*. It is noteworthy that this dissent observed that the trial court's instructions in *Stump* were more protective of the defendant's rights than those given in the instant case. 398 F. 2d at 126. The confusion promulgated under the Iowa alibi charge may be further emphasized by the practice of delivering the written instructions to the jury for use during deliberations. Cf., *Talty* v. *Lusk*, 4 Iowa (Cole) 469 (1857).

Respondent concludes by asserting two objections to petitioner's right to raise the question of the alibi instruction here: respondent urges that petitioner's trial counsel failed to take any exception to the challenged instruction, and also that this case is an old one, the trial occurring in 1934 (Resp. br. 19). As to respondent's assertion that there was a "failure to take any exception to the sixteenth instruction," this allegation is conclusively rebutted upon reference to the record. See defendant's exception to instruction 16, 1934 trial transcript record 395. This is not a case wherein trial counsel permitted the court to erroneously instruct, then combed the record for errors. Petitioner's resistance to the challenged instruction was communicated to the trial court and appears as part of the record in this case. Also, simply because petitioner's case is an old one in no way diminishes his right to relief. Indeed the annals of the law are filled with examples of wrongs which are remedied many years later, and the reputation of the law is enhanced mightily by the willingness of our courts to take such necessary corrective action. This brief has chronicled several reported instances wherein this has occurred. Respondent now seeks to deny the petitioner the benefit of a positive ruling by this Court because the precise challenge to the unconstitutional jury charge detailed herein was not raised in 1934. *Fay* v. *Noia*, 372 U. S. 391, makes clear that the Great Writ will provide relief for violations of significant constitutional rights notwithstanding alleged procedural deficiencies. "Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to languish in prison." 372 U. S. at 441.

In closing, petitioner does not seek to proscribe the State of Iowa from establishing reasonable rules of criminal procedure. But when a particular practice which is rejected by the vast majority of jurisdictions operates in a state court

to deprive the accused of certain fundamental rights, the practice must give way. See *Chapman* v. *California,* 386 U. S. 18, 20-21. See also *Morrison* v. *California,* 291 U. S. 82, 93; *Speiser* v. *Randall,* 357 U. S. 513, 525-26. The procedure employed in the petitioner's trial destroyed basic safeguards which are guaranteed all persons accused of crime. "There are a number of fundamental principles of law applicable to criminal cases which have been so universally accepted and applied in this country as to have become component parts of our understanding of the term 'due process of law.' Among such basic concepts we find the doctrine that, at the outset of the trial, an accused person is presumed to be innocent of the offense charged against him; that the state must satisfy the jury of the guilt of the defendant beyond a reasonable doubt; and that if upon any material issue of fact essential to guilt the jury has a reasonable doubt, the defendant is entitled to the benefit of that reasonable doubt and a verdict of not guilty." *People* v. *District Court,* 439 P. 2d 741, 743-44 (Colo. 1968).[14] The procedures employed in petitioner's trial did violence to these basic concepts.

CONCLUSION.

It appears undisputed in this case that a requested defense witness was held in jail during the course of petitioner's trial (Resp. br. 7). The record indicates that the official suppression and concealment of the witness was of such character that the rule of automatic relief should be invoked.[15] If, however, the case is deemed one requiring consideration of the harmless error rules, respondent ap-

14. On the importance of the presumption of innocence and rule of reasonable doubt, see *In re Urbasek,* 232 N. E. 2d 716, 720 (1968); *United States* v. *Costanzo,* 395 F. 2d 441, 445. See also Fletcher, *Two Kinds of Legal Rules,* 77 Yale L. J. 880 n. 2 (1968).

15. See Note, 81 Harv. L. Rev. 1260, 1273-75 (1968).

pears to have misinterpreted the allocation of appropriate burdens. The Supreme Court makes clear in recent decisions on the point that it is the respondent's burden to demonstrate beyond a reasonable doubt that an error is harmless. Once the exclusion of properly requested evidence is established, and in this case such fact appears undisputed, the burden falls on the state to demonstrate that Orsucci's testimony was inconsequential. The record appears barren of such proof. Indeed, the facts point to a contrary conclusion, indicating that he would have been a most important witness. Rather than carry their rightful burden, the respondent challenges the petitioner to make near-impossible demonstrations in order to prevail—demonstrate clear proof of prosecutorial complicity in the deception, demonstrate exactly what Orsucci's trial testimony would have proved, demonstrate a difference in result if the state hadn't suppressed him. The point is that these burdens belong to the state once the original error is established and the respondent has rather totally failed to carry them. Again in connection with the false notes it appears beyond serious question that error occurred when they were employed to secure conviction. In an earlier brief the respondent admitted that the introduction of these notes into evidence was incorrect (A. 56). Under these circumstances the burden should fall upon the respondent to demonstrate that the use of the evidence was harmless error. The difficulties of the respondent making such a showing at all, much less beyond a reasonable doubt, are apparent in view of the extensive testimony dedicated to the false notes upon trial of the case, and the prosecutor's reliance upon same in closing argument (A. 87-89, 110-12; see Pet. original br. 14-15). *Chapman* v. *California,* 386 U. S. 18, sets forth the state's burden to show the error harmless "beyond a reasonable doubt." See also *Anderson* v. *Nelson,* 88 S. Ct. 1133, which applies the *Chapman* rules in habeas corpus.

Finally, the Court of Appeals below, in deciding this case, observed that the great weight of authority rejected the practice of casting the burden of proof on an accused person in the manner disclosed here. Since the accused had produced witnesses to establish his non-presence at the scene of the offense, he was required to bear this burden by a preponderance of the evidence, a point the prosecutor drove home to the jury in closing argument (A. 113-14). The defendant was thus penalized for calling witnesses in his own behalf. The injustice of this procedure has moved courts to strike it down as violative of the accused's presumption of innocence, and more recently, as a denial of equal protection of the laws.

RONALD L. CARLSON,
Iowa City, Iowa,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

No. 32.—October Term, 1968.

Gale H. Johnson, Petitioner,
v.
John E. Bennett, Warden.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[December 16, 1968.]

Per Curiam.

In 1934, petitioner was indicted for murdering a policeman in Burlington, Iowa. Petitioner claimed that he was innocent and that he had not been present at the scene of the crime. At the trial, several witnesses testified that petitioner had been in Des Moines, 165 miles away from Burlington, on the day that the crime was committed. The trial judge instructed the jury that for the petitioner to be entitled to an acquittal on the ground that he was not present at the scene of the crime, the petitioner must have shown by a preponderance of the evidence that he was not present.[1] The jury found peti-

[1] The instruction was as follows:

"The burden is upon the defendant to prove [the] . . . defense [of alibi] by a preponderance of the evidence, that is, by the greater weight or superior evidence. The defense of alibi to be entitled to be considered as established must show that at the very time of the commission of the crime the accused was at another place so far away, or under such circumstances that he could not with ordinary exertion have reached the place where the crime was committed so as to have committed the same. If by a preponderance of the evidence the defendant has so shown, the defense must be considered established and the defendant would be entitled to an acquittal. But if the proof of alibi has failed so to show, you will not consider it established or proved. The evidence upon that point is to be

tioner guilty of second degree murder, and petitioner was sentenced to life imprisonment. His conviction was affirmed by the Iowa Supreme Court. *State* v. *Johnson*, 221 Iowa 8, 264 N. W. 596 (1936).[2]

In this habeas corpus proceeding, petitioner argued, among other points, that the State had denied him due process of law by placing on him the burden of proving the alibi defense. The United States District Court for the Southern District of Iowa rejected this argument, and the United States Court of Appeals for the Eighth Circuit held that any error did not reach constitutional dimensions. 386 F. 2d 677 (C. A. 8th Cir. 1967). We granted certiorari to consider the constitutionality of the alibi instruction, along with other issues. 390 U. S. 1002 (1968).[3] After we granted certiorari, the Court of Appeals for the Eighth Circuit, sitting *en banc*, held in another case that the Iowa rule shifting to the defendant the burden of proving an alibi defense violates the Due Process Clause of the Fourteenth Amendment. *Stump* v. *Bennett*, 398 F. 2d 111 (C. A. 8th Cir. 1968).[4] In view

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considered by the jury, and if upon the whole case including the evidence of an alibi, there is a reasonable doubt of defendant's guilt, you should acquit him."

[2] See also *State* v. *Johnson*, 221 Iowa 8, 21, 267 N. W. 91 (1936), in which the Iowa Supreme Court corrected certain errors made in its original opinion.

[3] The other issues were whether the State had suppressed evidence favorable to petitioner and intentionally used false evidence at petitioner's trial, in violation of the Fourteenth Amendment.

[4] The instruction in *Stump* was similar to the one in the present case. The Court of Appeals rejected the State's contention that any error was harmless because the jury was also instructed that the State had the burden of proving "the crime as a whole" beyond a reasonable doubt. The court pointed out that, in view of the instruction's inconsistency, reasonable minds could infer that the defendant retained the burden of proving nonpresence. 398 F. 2d, at 116, 121–122.

of that holding, we vacate the decision in this case and remand to that court for reconsideration.[5]

MR. JUSTICE BLACK dissents.

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[5] In *Stump*, the Court of Appeals said:

"[W]e are not directly faced with issues of retroactivity. We recognize that a panel of this court in Johnson v. Bennett, also a habeas corpus proceeding by an Iowa state prisoner, refused relief as to a number of matters, including the alibi instruction. The *Johnson* case concededly has some factual distinctions from the present one. Also significant is the fact that in the *Stump* case, unlike *Johnson*, counsel has carefully preserved by objections throughout the trial and appellate procedures his argument as to the unconstitutionality of the instruction." (Citations omitted.) 398 F. 2d, at 122–123.

We express no opinion as to the validity of the distinctions suggested by the Court of Appeals. Instead, we deem it appropriate to remand to that court for a definite ruling on the issue.